Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

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CAYCE COLLINS MOORE,

Petitioner,

vs.

DONAL CAMPBELL, Commissioner of the
Alabama Department of Corrections,

Respondent.

◆

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Eleventh Circuit

◆

PETITION FOR WRIT OF CERTIORARI

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RHONDA BROWNSTEIN
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
P.O. Box 2087
Montgomery, Alabama 36102-2087
(334) 956-8200
(334) 956-8481 Fax

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether an incompetent capital murder defendant can waive his right to be competent during a critical stage of his trial by allegedly self-inducing his incompetency. If so, what is the standard for determining whether the waiver was knowing and intelligent.

PARTIES TO THE PROCEEDINGS

The petitioner, appellant below, is Cayce Collins Moore.

The respondent, appellee below, is Donal Campbell, Commissioner of the Alabama Department of Corrections.

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OPINIONS BELOW

The Eleventh Circuit's opinion is reported as *Moore v. Campbell*, 344 F.3d 1313 (11th Cir. 2003). The district report opinion is unreported. *See Moore v. Haley*, No. 99-2693-CV-G-M (Dec. 18, 2001) (Report and Recommendation of Magistrate Judge). The state post-conviction opinion is likewise unreported. *See Moore v. State of Alabama*, CC-86-03.60 (March 2, 1999). All three opinions are reproduced in the accompanying Appendix.

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STATEMENT OF JURISDICTION

The Eleventh Circuit's decision was entered on September 15, 2003. The Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

◆

STATUTES INVOLVED

This case involves a federal habeas petition brought pursuant to 28 U.S.C. section 2254.

◆

STATEMENT OF THE CASE

Petitioner Cayce Moore is serving a sentence of life without parole for murder. Moore, who had just turned seventeen years old at the time of the murder and had a history of mental illness, was incompetent during a critical stage of his capital murder trial. This petition raises the questions of whether a capital defendant can waive his right to be competent during his trial by taking actions that caused his incompetency, and, if so, what is the standard under which such a waiver can be determined to be knowing and intelligent.

1. The Petitioner's 1987 Murder Trial

In May 1985, Missy Lee Macon was murdered in a convenience store in St. Clair County, Alabama. Seventeen year-old Cayce Moore and two teenaged co-defendants were charged with capital murder for the crime. The murder trial began on August 10, 1987, and centered on Moore's mental status at the time the crime was committed. Evidence at the trial established that Moore had an extensive history of severe clinical depression and numerous suicide attempts. App. 89-93 (1987 trial transcript, p. 607-12). At the time of Moore's arrest for the murder several days later, he was pointing a cocked and loaded gun at his head. App. 89 (1987 trial transcript, p. 347).

On August 16, 1987, the evening before Moore's insanity defense was to be presented to the jury, he attempted suicide by taking 180 barbiturates and antidepressants. App. 63 (hospital record). After spending several days in the hospital recovering from the overdose, Moore was transferred to the hospital's psychiatric unit, where he remained for another week. *Id.* During Moore's ten-day hospitalization, the trial was recessed. App. 2.

Dr. Claudio Toro was the hospital psychiatrist who treated Moore. On August 24, 1987, Dr. Toro warned the trial judge that Moore was highly suicidal: "Mr. Moore is depressed and is a high risk for another attempt at suicide. In my opinion, this problem will not be resolved in the foreseeable future." App. 69 (August 24, 1987, letter from Dr. Toro to Judge Carl Nesmith). In support of his opinion that Moore should be committed to a psychiatric institution for further treatment, Dr. Toro noted in a medical record that Moore was "extremely suicidal, very depressed, severely depressed, and would need to be considered for commitment." App. 64 (hospital record).

The trial judge ordered Dr. Kamal Nagi, a state doctor who was scheduled to testify against Moore as the State's rebuttal witness to Moore's insanity defense, to conduct a competency evaluation to determine if Moore was competent to resume trial and to report its finding to the court. App. 74 (order). Although Dr. Nagi alleged at Moore's post-conviction hearing that he had conducted a competency evaluation on or about August 25, 1987, there was no competency hearing held, nor did Dr. Nagi file a written report of his findings. App. 2. Dr. Nagi apparently told the trial judge, *off the record*, that Moore was competent to stand trial. App. 78 (1987 trial transcript). Because no competency hearing was held, Dr. Nagi's opinion was never subjected to cross-examination. Dr. Nagi conducted no further competency examinations after August 25, 1987.

On the same day as Dr. Nagi's supposed evaluation, the State filed a motion to revoke Moore's bond, arguing that Moore was "obviously a present danger to himself and others." App. 71 (motion to revoke bond). The trial court granted the State's motion. App. 2. Two days later, Moore was removed from the hospital by sheriff's deputies and placed in a suicide cell in the county jail. *Id.* Dr. Toro, the hospital psychiatrist, strongly objected to Moore's hospital discharge. In a second letter to the trial judge, Dr. Toro warned that Moore was highly suicidal: "As pointed out to Sheriff Brown, Mr. Moore suffers from severe depression with a *very high risk for suicidal behavior*. It is my opinion that Mr. Moore needs to be treated and observed continuously for prevention of suicidal behavior." App. 70 (August

27, 1987, letter from Dr. Toro to Judge Nesmith) (emphasis added).

Despite Dr. Toro's warning, the judge resumed the trial and ordered no further competency evaluations. Just as Dr. Toro had predicted, Moore tried to kill himself immediately upon his release from the hospital by refusing all food and drink in an effort to starve himself to death. By the time the trial had resumed on August 31, 1987 – the first day that the defense presented its case – Moore had been starving himself and refusing to drink fluids for four days. By the second day of the trial – September 1, 1987 – Moore had not eaten or drank fluids for five days. Moore's failure to eat and drink for such an extended period of time had a profound effect on his brain's ability to function and rendered him totally incompetent during the second half of his trial. App. 3-6.

On September 4, 1987, Moore was found guilty of capital murder and later sentenced to life without parole. His direct appeal, which claimed that pretrial and mid-trial publicity prejudiced the jury, was denied.

2. State Post-Conviction History

Moore filed a state post-conviction petition (a "Rule 32"); an evidentiary hearing on his claims was held on October 16, 1998. At the hearing, Moore presented unrebutted evidence that his failure to eat and drink after the resumption of his trial rendered him incompetent during at least two days of the trial – August 31 and September 1, 1987. Dr. James Lewis, a nephrologist and an Assistant Professor of Medicine at the University of Alabama School of Medicine, explained that a healthy, nineteen year-old male who fails to eat and drink for several days will suffer from dehydration and volume depletion. "Dr. Lewis stated that dehydration can result in a person being listless, stuperous, confused, and disoriented" and that "if a person is dehydrated, it could also affect their ability to understand the events taking place around them and to engage in conversation." App. 4-5.

Dr. Stanley Brodsky, a University of Alabama forensic psychology professor with substantial experience in the assessment of competency to stand trial, also testified at the Rule 32 hearing. Based on his review of the evidence and interviews with Moore and others, Dr. Brodsky concluded that on August 31 and September 1, 1987, Moore was "seriously and substantially impaired in his ability to understand proceedings rationally; to consult with his attorneys and aid in his own defense." Dr. Brodsky also testified that Moore's mid-trial suicide attempt and subsequent refusal to eat and drink were "absolutely consistent with the characteristics of a major depressive episode." App. 5-6. The State did not present any evidence to rebut Moore's evidence that he was incompetent on August 31 and September 1, 1987.

The state court denied Moore's Rule 32 petition, concluding that (1) Moore had not been incompetent; and (2) if he had been, his failure to eat and drink during his trial was a "tactic" that was intended to achieve a mistrial. See App. 7. The state court's opinion was based entirely on Dr. Nagi's testimony – revealed for the first time at the Rule 32 hearing – that Moore had implied that he has taken the mid-trial drug overdose in an effort to get a mistrial. App. 58 (state court opinion). (Indeed, Moore's trial counsel never moved for a mistrial.) The Rule 32 trial court's decision was upheld by the Alabama appellate courts, albeit entirely on procedural grounds that are not at issue here.

3. The District Court's Decision

Moore then filed a timely federal habeas corpus petition. The district court rejected almost every factual finding of the state Rule 32 judge as "either incorrect, irrelevant, or too speculative to have been considered." *See* App. 45 (Report and Recommendation of Magistrate Judge). Contrary to the state court, the district court found that Moore was, in fact, incompetent during two days of his murder trial: "The court concludes that petitioner presented substantial evidence at the Rule 32 proceeding that he was incompetent during two days of his trial and that respondents have failed to present any evidence to refute petitioner's evidence." *See* App. 48. Nevertheless, the district court denied the habeas petition, concluding that by refusing to eat or drink during his trial, Moore "self-impose[d] a state of incompetence on himself for the purpose of 'delaying or trifling with the court'" and therefore "forfeit[ed] his right to be competent when tried." *Id.* at 54.

4. The Decision of the Court of Appeals

The Eleventh Circuit Court of Appeals upheld the district court. *See Moore v. Campbell*, 344 F.3d 1313 (11th Cir. 2003). Although the court of appeals assumed (without deciding) that the state court's finding that Moore was competent on August 31 and September 1, 1987, was an unreasonable determination of the facts in light of the evidence presented at the state Rule 32 proceeding, it denied habeas relief on the same basis as the district court: that "Moore, by his hunger strike (which contributed to his incompetency) forfeited his right to be competent at trial." App. 15.

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REASONS FOR GRANTING THE WRIT

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' FINDING THAT A CAPITAL MURDER DEFENDANT CAN WAIVE HIS RIGHT TO BE COMPETENT DURING HIS TRIAL, WITHOUT CONDUCTING AN INQUIRY INTO WHETHER THAT WAIVER WAS KNOWING AND INTELLIGENT, RAISES AN IMPORTANT FEDERAL QUESTION AND CONFLICTS WITH THIS COURT'S PRIOR DECISIONS

This Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (citing *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171 (1975); and *Pate v. Robinson*, 383 U.S. 375, 378 (1966)).

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper, 517 U.S. at 354 (quotation omitted). And, in *Pate v. Robinson*, the Court held that the right to be competent at one's trial is non-waivable: "[I]t is contradictory to argue that a defendant may be incompetent, yet knowingly or intelligently 'waive' his right to have the court determine his competency to stand trial." 383 U.S. 375, 384 (1966).

The Court of Appeals below found that that Moore's "intentional" refusal to eat and drink during his capital murder trial – the action that led to his incompetency – resulted in a waiver of his right to be competent. The Court of Appeals distinguished *Robinson*'s "no-waiver" holding on the basis that "in [*Robinson*], there was no allegation that the defendant *induced* his own incompetency." App. 17 (emphasis is original). But the relevant question here is not whether Moore's intentional refusal to eat and drink caused his incompetency; rather, the question is whether Moore knowingly and intelligently waived his substantive due process right to be competent at his capital murder trial. Neither the state court nor the Court of Appeals ever made such a determination. Instead, those courts simply concluded – on the basis of one sentence of testimony from the state post-conviction hearing – that Moore had "competently and purposefully embarked on a process that would result in his becoming incompetent or otherwise absent from trial." App. 20.

The relinquishment of a constitutional right as important as the one at issue here is not so cavalierly determined as the Court of Appeals suggests. Instead, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and [ ] 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.*; *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1981) ("waivers of right to counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'") (citation omitted); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that a defendant can waive his right to be present during his trial "if, after being warned by the judge that he will be removed if he continues his disruptive behavior [but] nevertheless insists on conducting himself in a matter so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.")

The Court of Appeals below failed to make the determination required by *Johnson v. Zerbst* and its progeny. Had it done so, it would have likely determined that there was insufficient evidence upon which to conclude that Moore knowingly and intelligently waived his right to be competent during his trial.

There was substantial evidence that Moore's failure to eat and drink during a five day period after his drug overdose was a bona fide suicide attempt. Moore's first suicide attempt during the trial – the ingestion of 180 barbiturates and anti-depressants – rendered him comatose and nearly resulted in his death, a fact completely ignored by the state court and by the Court of Appeals. App. 63, 66 (hospital discharge summary and hospital emergency room record noting patient was comatose). The psychiatrist who treated Moore at the hospital was adamantly opposed to Moore's discharge, and warned the trial court twice that Moore was "extremely suicidal, very depressed, severely depressed, and would need to be considered for [psychiatric] commitment." *Id.*; App. 69, 70 (letters from Dr. Toro to sheriff and trial judge).

According to Dr. Stanley Brodsky, one of the experts who testified at the Rule 32 hearing, both of Moore's mid-trial suicide attempts were "absolutely consistent with the characteristics of a major depressive episode." App. 5-6. This expert testimony was unrebutted. Both suicide attempts were also consistent with Moore's extensive history of severe depression and numerous suicide attempts. *See* App. 89-93 (1987 trial testimony that, by the age of twelve, Moore had already held a loaded gun to his head and had slashed his wrists; testimony of arresting officer that Moore was holding a loaded gun to his head and threatening suicide at the time of his arrest).

As the Court recognized in *Drope v. Missouri*, a case in which the state had likewise argued that the petitioner's suicide attempt during trial was not bona fide, a near-fatal suicide attempt by a defendant in the midst of his trial is strong evidence of incompetency, rather than of malingering. 420 U.S. 162, 181 n. 16 (1975) ("a self-inflicted wound near vital organs does not suggest malingering"); *see also id.* (attempted suicide is "an act which suggests a rather substantial degree of mental instability contemporaneous with the trial"); *cf. also United States v. Latham*, 874 F.2d 852, 858 (1st Cir. 1989) ("It defies common sense to maintain that a sane defendant would attempt suicide to avoid a trial on drug charges. And, death is not the type of 'voluntary absence from trial' that concerns us.").

Balanced against the strong evidence that Moore's refusal to eat and drink was a bona fide suicide attempt is a slender reed of evidence: one sentence of testimony by state psychiatrist Dr. Kamal Nagi. According to Dr. Nagi, Moore had made the following statement to him at the psychiatric hospital after Moore's suicide attempt by overdose: "I'm very frustrated. What do you want me to do

– shoot the jury to have it mis-tried?" App. 21. Under this Court's rulings in *Johnson v. Zerbst* and its progeny, Dr. Nagi's testimony is wholly insufficient to establish that Moore knowingly and intelligently waived a fundamental right as important as the one to be competent to stand trial for capital murder.

First, Dr. Nagi's testimony has little bearing on the question of whether Moore was attempting to obtain a mistrial when he refused to eat or drink for a five-day period *after* the earlier suicide attempt by overdose. As the court below recognized, Dr. Nagi admitted at the Rule 32 hearing that he was completely unaware of the fact that Moore had tried to kill himself again by refusing to eat and drink; Dr. Nagi's last contact with Moore was at the hospital after Moore's overdose *more than a week before Moore's second suicide attempt*. App. 7. *Cf. Drope v. Missouri*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.").

Second, the alleged statement is inherently suspect. Moore's alleged statement to Dr. Nagi that his mid-trial suicide attempt was a trial tactic would obviously have bolstered Dr. Nagi's 1987 trial testimony that Moore was not insane when he committed the crime, yet Dr. Nagi never mentioned the purported statement at the trial; his first mention of the matter was eleven years later at the Rule 32 hearing. It is, moreover, contradictory to assert on one hand that Moore cleverly induced his own incompetency in a calculated trial strategy, yet claim on the other hand that Moore would admit to a State agent – a doctor he knew would be testifying against him at a trial in which his life was at stake – that he was covertly attempting to disrupt his trial. If Dr. Nagi's testimony is true, Moore's statement to the doctor is further evidence of Moore's irrationality, not of his calculation to disrupt his trial. *Cf. Drope v. Missouri*, 420 U.S. at 179 (emphasis added) ("Too little weight was given to the testimony of the petitioner's wife that on the Sunday prior to trial he tried to choke her to death. *For a man whose fate depended in large measure on the indulgence of his wife, who had hesitated about pressing the prosecution, this hardly could be regarded as rational conduct.*").

Third, Dr. Nagi's Rule 32 testimony was wholly unreliable. He repeatedly contradicted himself on a critical matter: whether Dr. Toro (the hospital psychiatrist who treated Moore after his overdose) had objected to Moore's release from the hospital. In 1987, Dr. Nagi testified that Dr. Toro wanted Moore to receive additional treatment before being released. *See* App. 86 (1987 trial testimony, p. 151) ("[Dr. Toro] said 'I'm going for commitment' because he was afraid to let him go."). At the Rule 32 hearing eleven years later, however, Dr. Nagi completely changed his story, claiming for the first time that Dr. Toro had told Dr. Nagi that Moore was ready to be released. App. 78-80 (Rule 32 testimony, pp. 141-42; p. 144). After being confronted with his prior inconsistent statement from the 1987 trial, Dr. Nagi first acknowledged his prior testimony (albeit reluctantly), then denied it, then acknowledged it again. App. 82, 85-86 (Rule 32 testimony, pp. 146, 150-51).[1]

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[1] Dr. Nagi's new version of events was also directly at odds with the uncontested evidence in the record that Dr. Toro fought to keep

(Continued on following page)

Finally, Dr. Nagi's Rule 32 testimony reflects that he either was trying to play down the severity of Moore's suicidal condition or that he has no reliable memory of the case. He testified that Moore was hospitalized after the suicide attempt for "a couple of days only. . . . I don't know – twenty-four hours or so." App. 87 (Rule 32 testimony, p. 152). Moore was actually hospitalized for ten days, including seven days in a closed psychiatric unit. *See id.* at 63 (hospital records). Dr. Nagi also testified that when he visited Moore at the hospital following his overdose, Moore "was not on one-to-one observation or any suicidal observation." App. 77 (Rule 32 testimony, p. 136). But the hospital records show that Moore was on constant suicide observation. App. 64 (hospital record).

In light of Dr. Nagi's contradictory and factually baseless statements at the Rule 32 hearing, his entire testimony should have been given little, if any, weight.[2] In the absence of Dr. Nagi's testimony, there is simply no evidence that Moore's mid-trial suicide attempts were anything but bona fide attempts on his life that stemmed from his severe depression. And even crediting Dr. Nagi's testimony as true, that testimony is not, standing alone, sufficient to establish under this Court's precedent that Moore knowingly and intelligently waived his due process right to be competent during his trial. As in *Drope v.*

Moore hospitalized after his suicide attempt and strongly opposed his release. *See* App. 69, 70 (letters from Dr. Toro to trial judge).

[2] The Rule 32 hearing in this case was not the first time that Dr. Nagi has offered unreliable testimony. In *Slaton v. State*, the Alabama Court of Criminal Appeals found that "Dr. Nagi's testimony appears disjointed and often unresponsive." 680 So.2d 879, 891 (Ala.Crim.App. 1995).

Missouri, "even assuming the right to be [competent] was one that could be waived, [it] is clear that there was an insufficient inquiry to afford a basis for deciding the issue of waiver." 420 U.S. at 182.

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CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

RHONDA BROWNSTEIN
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Post Office Box 2087
Montgomery, AL 36102-2087
(334) 958-8200

Counsel for Petitioner

344 F.3d 1313

United States Court of Appeals
Eleventh Circuit.

Cayce Collins MOORE, Petitioner-Appellant
Cross-Appellee,
v.
Donal CAMPBELL, Attorney General for the
State of Alabama, Respondents-Appellees
Cross-Appellants.

No. 02-11302.

Sept. 15, 2003.

Rhonda Brownstein, Southern Poverty Law Center, Montgomery, AL, for Moore.

James Bartholomew Prude, Montgomery, AL, for Campbell.

Appeals from the United States District Court for the Northern District of Alabama.

Before *EDMONDSON*, Chief Judge, and *KRAVITCH* and GIBSON*, Circuit Judges.

PER CURIAM:

Cayce Moore appeals the district court's denial of his petition for a writ of habeas corpus, 28 U.S.C. § 254. The State of Alabama ("the State") cross-appeals the district court's determinations that Moore's habeas petition was not time-barred and that Moore's claims were not procedurally

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*** Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation**

barred. We affirm the district court's denial of Moore's habeas petition.[1]

I. BACKGROUND

After being charged with capital murder, Moore entered a plea of not guilty by reason of mental defect or disease. Before trial, mental health professionals examined Moore and found him competent to stand trial. Moore's trial began on 10 August 1987. On Monday, 17 August 1987, Moore's counsel informed the court that Moore had attempted suicide by taking a drug overdose. The trial court declared a recess in the trial to allow Moore to be treated. On 24 August 1987, Dr. Claudio Toro, the psychiatrist treating Moore, wrote a letter warning the trial court that Moore was depressed and a high suicide risk. At about this same time, the district court ordered that Moore be examined to determine his competency to stand trial. Dr. Kamal Nagi, a psychiatrist, examined Moore and informed the trial court that Moore was competent to stand trial.[2]

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[1] The district court granted a certificate of appealability ("COA"), but failed to specify the issues for appellate review. Although we could remand to the district court with instructions to specify the issues, we choose to decide ourselves which issues are worthy of COA. *See Peoples v. Haley*, 227 F.3d 1342, 1346 (11th Cir.2000). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Upon review of the record and the district court's opinion, we conclude that Moore has made the requisite showing for each of the claims raised in his brief. We therefore address each of these issues below.

[2] It does not appear that Dr. Nagi filed a written report, and no competency hearing was held.

The trial court granted the State's motion to revoke Moore's bond. On 27 August 1987, Moore was taken from the hospital to the St. Clair County Jail where he was placed on suicide watch. Moore's trial resumed on 31 August 1987. On the evening of 1 September 1987, Moore was taken to the hospital, treated for dehydration, and discharged about four-and-a-half hours later. On 4 September 1987, the jury convicted Moore of capital murder. Moore was sentenced to life imprisonment without parole.

On appeal, the Alabama Court of Criminal Appeals affirmed Moore's conviction and sentence. *Moore v. State*, 546 So.2d 404 (Ala.Crim.App.1989). The Alabama Supreme Court denied Moore's petition for a writ of certiorari on 4 August 1989. *Ex Parte Moore*, 549 So.2d ~~1363~~ (Ala.1989).

On 24 April 1997, Moore filed a petition for post-conviction relief in state court pursuant to Ala.R.Crim.P. 32. He alleged, among other things, that (1) Moore was mentally incompetent during a portion of his capital murder trial, (2) the trial judge had substantial evidence before the court which raised a reasonable doubt about Moore's competency to stand trial and, therefore, should have held a hearing on its own motion, and (3) Moore's counsel rendered ineffective assistance by failing to request a competency hearing and by failing to appeal the trial court's failure to hold a competency hearing.

On 16 October 1998, the state court held an evidentiary hearing on Moore's Rule 32 petition. Moore presented witnesses and submitted evidence for the state court's consideration.

Raymond Chapman, the "head trusty" at the county jail during Moore's trial, testified that Chapman and the other inmates were assigned to watch Moore to ensure that he would not attempt suicide. Chapman stated that, from Moore's arrival on 27 August 1987 until Moore was taken to the hospital on 1 September 1987, he did not observe Moore consume food or drink. Chapman testified that when Moore's trial resumed on 31 August 1987, he had to help Moore bathe and dress for court. That evening, the sheriff took Moore to a local physician, Dr. Norrell. According to Dr. Norrell's records, Moore had "refused to take food or fluids for four days" and "refused [an] injection [of] B-12."

On 1 September 1987, Chapman again bathed and dressed Moore for court. Chapman stated that, when Moore returned from court, he was in the same condition and was not talking to anyone. Later that evening, Moore was found lying unconscious on the floor of his cell. Moore was taken to the hospital.

Jean Moore, Moore's mother, testified that at the hospital Moore was "[a]lmost lifeless, pale – not really responding to me." Jean Moore stated that, when she begged Moore to accept the medical treatment, he initially refused. Jean Moore testified that, when she asked Moore if he would drink some water, he responded "[w]e'll just go to the Galleria [a Birmingham shopping mall] and get some orange spice tea." Jean Moore said that she eventually talked Moore into accepting medical treatment.

Moore was nineteen at the time of the trial. At the Rule 32 hearing, Dr. James Lewis, an Assistant Professor of Medicine at the University of Alabama, testified that a healthy, nineteen year-old male who fails to eat or drink for several days will suffer some effects of dehydration or volume depletion. Dr. Lewis stated that dehydration can result in a person being listless, stuporous, confused, and disoriented. Dr. Lewis further testified that, if a person is dehydrated, it could also affect their ability to understand the events taking place around them and to engage in conversation.

Dr. Lewis stated that the emergency room physician's description of Moore as "listless" with "breath smelling of ketones" was consistent with someone who was dehydrated or volume depleted.[3] Dr. Lewis further testified that, although not a positive conclusion, if someone did not eat or drink for four days, was listless, had breath smelling of ketones, and was weak and disoriented, Dr. Lewis would be led to a medical conclusion that the person was dehydrated or volume depleted. Dr. Lewis, however, stated he would want to see a patient before initiating therapy.

At the Rule 32 hearing, Dr. Stanley Brodsky, a University of Alabama forensic psychology professor, testified that – based on his post-trial interviews with Moore and review of available information (including newspaper articles about the trial, Moore's hospital records, Dr. Toro's psychological evaluation, and the expert testimony at trial) – Moore was "seriously and substantially impaired [in] his ability to understand proceedings rationally; to consult with his attorneys and aid in his own defense" on

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[3] At the Rule 32 hearing, Moore submitted the affidavit of Dr. David Langille, the emergency room physician who treated Moore on 1 September 1987. Dr. Langille averred that when the sheriff's deputies brought Moore to the emergency room, Moore appeared listless and his mouth smelled of ketones. Dr. Langille diagnosed Moore as suffering from starvation ketosis, treated him for dehydration by administering several liters of fluids intravenously, and discharged Moore about four-and-a-half hours later.

31 August and 1 September 1987. Dr. Brodsky testified that Moore's mid-trial suicide attempt and later refusal to eat and drink were "absolutely consistent with the characteristics of a major depressive episode." Dr. Brodsky stated that it was not Moore's depression by itself that made Moore incompetent, but Moore's failure to eat or drink. Dr. Brodsky testified that he did not believe that Moore's refusal to eat or drink was an attempt to manipulate the trial, but instead the result of Moore's depression.[4]

In rebuttal, the State presented the testimony of a St. Clair County sheriff's deputy, the St. Clair County District Attorney, and Dr. Nagi.

Dr. Nagi testified that after Moore's drug overdose he evaluated Moore at the request of the trial judge. Dr. Nagi stated that Moore expressed concerns about receiving a fair trial in the venue where the trial was taking place and stated that he wanted the trial moved. Dr. Nagi testified that Moore told him "I'm very frustrated. What do you want me to do – shoot the jury to have it mistried?" Dr. Nagi testified that he concluded that Moore was competent to stand trial and informed the trial judge of this fact.

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[4] At the Rule 32 hearing, Moore also presented the testimony of a news reporter and photographer, and submitted newspaper articles from the time of his trial which discussed Moore's hunger strike and his appearance. These witnesses testified that Moore appeared weak and "out of it." The newspaper reporter stated that she observed Moore's attorneys attempting to communicate with Moore, but that he was unresponsive. The newspaper articles indicated that Moore was weak and at times "disoriented."

Dr. Nagi stated that he was not aware that Moore later had restricted his intake of food and liquid.[5]

The state court found and concluded that Moore was competent to stand trial and was able to aid and assist his counsel in his defense. The state court also found that Moore "undertook a calculated and concerted effort to disrupt his capital murder trial." The state court concluded that Moore's asserted incompetence was similar to a disruptive defendant who is excluded from the courtroom and stated that "[o]ne whose own actions causes him to be absent from trial, cannot claim error." The Alabama Court of Criminal Appeals affirmed the denial of Moore's Rule 32 petition in a memorandum opinion, concluding that all of Moore's claims were time-barred and that his claims of substantive and procedural incompetency were also procedurally barred. Moore then petitioned the Alabama Supreme Court for a writ of certiorari.

While his petition for a writ of certiorari with the Alabama Supreme Court was pending, Moore filed a federal habeas petition pursuant to 28 U.S.C. § 2254 raising procedural and substantive competency claims and ineffective assistance of counsel claims.[6]

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[5] The sheriff's deputy testified that, although Moore was weak and was assisted by the sheriff's deputies, Moore was able to walk on his own. The District Attorney testified that he observed Moore during the two days in question and remembered seeing Moore communicate with his attorneys. The District Attorney, however, could not recall whether he had observed Moore speaking with his attorneys on 31 August and 1 September 1987.

[6] After filing his § 2254 petition, Moore moved in district court to stay the proceedings in federal court pending the outcome of his state Rule 32 proceedings. Moore sought the stay on the grounds that, once

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The State responded that Moore's habeas petition was time-barred and that Moore's claims were procedurally defaulted because they were raised outside Rule 32's two-year statute of limitations. The State further argued that Moore was entitled to no relief because he had failed to establish that he was incompetent and, regardless, any incompetence was self-induced.

A magistrate judge issued a report and recommendation. The magistrate judge first determined that Moore's federal habeas petition was timely. The magistrate judge next concluded that Moore's claims were not procedurally barred despite Moore's failure to raise his claims in state court within the two-year statute of limitations set out in Ala.R.Crim.P. 32.2(c). The magistrate judge determined that, because the jurisdictional nature of Rule 32.2(c) – where the state had not affirmatively plead the timeliness defense – was not "firmly established and regularly followed" at the time of Moore's Rule 32 proceeding, the claims were not procedurally barred under this rule. The magistrate concluded, however, that because Moore failed to raise his procedural claim (no competency hearing) at trial or on direct appeal, this claim was procedurally defaulted under Ala.R.Crim.P. 32.2(a)(3) and (5) unless Moore showed cause and prejudice.

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the Alabama Supreme Court ruled, he would have only one day to file his § 2254 petition and that it could take longer than one day for the notice of the Alabama Supreme Court's ruling to be received in the mail. The State did not object, and the district court granted the motion. The stay was lifted after the Alabama Supreme Court denied Moore's Rule 32 petition. The State in this case does not assert a failure-to-exhaust-state-remedies defense.

The magistrate judge then considered whether Moore was able to establish that counsel's failure to raise the procedural incompetency claim on appeal established sufficient cause and prejudice to allow Moore to avoid the procedural bar. The magistrate judge noted that, if the Rule 32 court's determination that Moore was competent was correct, then trial and appellate counsel could not have been ineffective for failing to raise the issue.

The magistrate judge concluded that the state court's determination that Moore was competent throughout his trial was an unreasonable determination of the facts in the light of the evidence presented at the state court proceedings. But the magistrate judge also determined that, because Moore's incompetency was self-imposed, he forfeited his right to be competent during his trial and, therefore, neither trial nor appellate counsel was ineffective for failing to raise the issue. The magistrate judge also concluded that Moore's procedural claim – that the trial court erred by failing to hold a competency hearing on its own motion – was deficient because the evidence did not reflect that the trial court ignored facts raising a "bona fide doubt" about Moore's competency to stand trial. The magistrate judge recommended that Moore's habeas petition be denied.

The district court adopted the magistrate judge's report and recommendation and denied Moore's habeas petition. Moore appeals. The State cross-appeals the district court's determinations that Moore's habeas petition was timely and that Moore's claims were not procedurally defaulted.

II. DISCUSSION

A. *Time Bar*

In its cross-appeal, the State argues that the district court erred by refusing to dismiss Moore's petition as untimely filed. The State asserts that this Court has consistently stated that the one-year grace period for filing federal habeas petitions expired on 23 April 1997. The State contends that the district court erred by applying Fed.R.Civ.P. 6(a) to determine the ending date of the "grace period" because Rule 6(a), by its own terms, does not apply to the court-created fixed date for filing petitions following the passage of Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

We review *de novo* the district court's determination that Moore's federal petition for habeas corpus relief was not time barred. *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir.2002).

AEDPA imposed a one-year limitation period for filing a § 2254 petition. 28 U.S.C. § 2244(d). This Court concluded that prisoners whose convictions became final before the enactment of the AEDPA had to be given a "reasonable time" to file their habeas petitions. *Wilcox v. Florida Dep't of Corrections*, 158 F.3d 1209, 1211 (11th Cir.1998). We said that a reasonable period was until 23 April 1997: one year after the enactment of the AEDPA. *See id.; see also Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir.1998) (28 U.S.C. § 2255).

In these decisions and the decisions that followed, no case, however, turned on the precise beginning or ending of the one-year limitation period; and it was unnecessary for us to consider whether Fed.R.Civ.P. 6(a) applied to the "one year from the date of the enactment" standard. Never have we held that a petition filed on 24 April 1997 in a case was barred as too late. Nor do our precedents actually make a choice between 23 April or 24 April as a deadline. Thus, our statements that a reasonable grace period was until 23 April 1997 are dicta if the statements are viewed as setting a hard-edged deadline; they do not control our decision under Fed.R.Civ.P. 6(a) today. *See generally United States ex rel. Southeastern Mun. Supply Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 876 F.2d 92, 93 (11th Cir.1989) (stating that a case is authority only for what it actually decides).

The general rule for computing time limitations in federal courts is Federal Rule of Civil Procedure 6(a) which provides that "[i]n computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." Fed.R.Civ.P. 6(a).

We have determined that, for petitioners whose convictions became final *after* the enactment of the AEDPA, Rule 6(a) applies to the calculation of the one-year statute of limitations. *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir.2001). Although the one-year grace period pertinent in the present case is a judicially created extension of the effective date of the AEDPA, we agree with the other circuits that have considered this issue. We conclude that Rule 6(a) also applies to the effective date of the AEDPA. *See United States v. Hurst*, 322 F.3d 1256, 1261 & n. 4 (10th Cir.2003); *Newell v. Hanks*, 283 F.3d 827, 833 (7th Cir.2002); *Hernandez v. Caldwell*, 225 F.3d 435, 438-39 (4th Cir.2000); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir.2001); *Rogers v.*

United States, 180 F.3d 349, 355 & n. 13 (1st Cir.1999); *Moore v. United States*, 173 F.3d 1131, 1133-35 (8th Cir.1999); *Flanagan v. Johnson*, 154 F.3d 196, 200-02 (5th Cir.1998); *Mickens v. United States*, 148 F.3d 145, 148 (2d Cir.1998); *see also Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir.2001), *cert. denied*, 534 U.S. 1135, 122 S.Ct. 1081, 151 L.Ed.2d 981 (2002) (holding that the limitations period expired on April 24, 1997); *United States v. Cicero*, 214 F.3d 199, 202 (D.C.Cir.2000) (same). *See generally Public Health Trust of Dade Cty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 n. 4 (11th Cir.1993) ("We do not create intercircuit splits lightly").[7] Accordingly, the district court did not err by concluding that Moore's habeas petition was timely.

B. *Procedural Bar*

The State argues that the district court erred by refusing to dismiss Moore's claims as procedurally barred. The State contends that, although the State failed to raise the statute of limitations defense before the Rule 32 court, the Alabama Court of Criminal Appeals's dismissal of Moore's claims as time barred qualified as "a firmly established and regularly followed" rule to preclude substantive review of Moore's claims.

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[7] We observe that the Third Circuit has stated that the grace period includes 23 April 1997; it, however, has done so without purporting to make the choice about whether a petition filed on 24 April 1997 would be timely. *See, e.g., Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998) ("habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit.").

We review *de novo* the district court's determination that Moore was not procedurally barred from raising his claims in federal court. *Wright v. Hopper*, 169 F.3d 695, 701 (11th Cir.1999).

A state court's rejection of a federal constitutional claim on procedural grounds will only preclude federal review if the state procedural ruling rests upon an "independent and adequate" state ground. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Only rules that are "firmly established and regularly followed" qualify as adequate state grounds for precluding substantive review of federal claims. *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 857, 112 L.Ed.2d 935 (1991); *Cochran v. Herring*, 43 F.3d 1404, 1408 (11th Cir.1995).

This Court in *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir.2003), concluded that, before the Alabama Supreme Court's decision in *Williams v. State*, 783 So.2d 135, 137 (Ala.Crim.App.2000), the jurisdictional character of Alabama Rule of Criminal Procedure 32.2(c) was not firmly established and not regularly followed. Because the jurisdictional rule in *Williams* was rendered well after the Alabama courts ruled on Moore's Rule 32 petition in 1998 and 1999, the district court properly concluded that Moore's claims were not procedurally barred.

C. *Competency to Stand Trial*

Moore argues that the unrebutted evidence presented at the Rule 32 hearing demonstrated that he was incompetent to stand trial. Moore's incompetency claim contains several procedural and substantive components: First, Moore contends that the state violated his right to due process under the Fourteenth Amendment by trying him while incompetent. Second, Moore argues that, because bona fide doubt existed about Moore's competence to stand trial, the trial court should have held a competency hearing. Third, Moore contends that counsel rendered ineffective assistance by failing to move for a competency hearing during the trial.

We review the district court's grant or denial of habeas corpus relief *de novo*. *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir.1998). Under § 2254(d) a federal habeas court can grant relief for a claim adjudicated on the merits in state court only where the adjudication in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000).[8]

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[8] We realize that the Alabama Court of Criminal Appeals affirmed the judgment of the Rule 32 court on different grounds. But the Alabama Court of Criminal Appeals did not decide that the Rule 32 court's adjudication on the merits was an inaccurate view of the merits. We therefore give the decision of the Rule 32 court deference under 28 U.S.C. § 2254(d). Neither party has directly argued the question of whether the Alabama Court of Criminal Appeals's decision on different grounds deprives the Rule 32 court's decision of deference by federal courts per section 2254(d).

1. *Substantive Due Process Claim*

Moore asserts that, once the district court concluded that Moore was incompetent on 31 August and 1 September 1987, it should have granted his habeas petition. Moore also contends that no evidence shows that he induced his own incompetency and that the right to be competent at trial cannot be waived.

The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting defendants who are mentally incompetent. *See Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir.1995). The standard for mental competency to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *See Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

We will assume – without deciding – that the state court's finding that Moore was competent, in fact, on 31 August and 1 September 1987 was an unreasonable determination of the facts in the light of the evidence presented at the State Rule 32 proceeding. For background, see 28 U.S.C. § 2254(d). Even assuming, however, that Moore was incompetent, in fact, for these two days of his trial, he is entitled to no habeas relief. The state court's additional determination that Moore, by his hunger strike (which contributed to his incompetency), forfeited his right to be competent at trial is neither contrary to nor an unreasonable application of the pertinent federal law in the light of the state court's reasonable determination of facts supported by the evidence presented at the state proceedings.

We first consider whether the state court's determination that a defendant can forfeit his right to be competent at trial was contrary to or an unreasonable application of clearly established Supreme Court law.

The requirement that a defendant be mentally competent to stand trial "has deep roots in our common-law heritage." *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353 (1992). This prohibition seeks to protect defendants who, due to their condition, are unable to participate in their defense. *See Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 1381-82, 134 L.Ed.2d 498 (1996). Thus, the requirement that a defendant have a rational as well as factual understanding of the proceedings against him and have a sufficient present ability to consult with his lawyer essentially assures that the defendant is mentally, as well as physically, present in the courtroom.

The Supreme Court has determined that, in some cases, a defendant may forfeit his constitutional right to be physically present at his own trial. *See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 1062, 25 L.Ed.2d 353 (1970) (trial court's removal of defendant from courtroom after defendant continued to disrupt proceedings not unconstitutional); *see also Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 196, 38 L.Ed.2d 174 (1973) (affirming conviction where judge conducted trial without defendant, pursuant to Fed.R.Crim.P. 43, where defendant failed to appear for the remainder of his trial after attending its beginning); *accord United States v. Edwards*, 303 F.3d 606, 627 (5th Cir.2002), *cert. denied*, 537 U.S. 1192, 123 S.Ct. 1272, 154

L.Ed.2d 1025 (2003) (concluding that defendant was voluntarily absent under Fed.R.Crim.P. 43 where defendant delayed necessary medical treatment until trial commenced); *United States v. Crites*, 176 F.3d 1096, 1097-98 (8th Cir.1999) (concluding that trial court did not clearly err in finding that defendant was voluntarily absent after suicide attempt left him unconscious and hospitalized); *State v. Rice*, 110 Wash.2d 577, 757 P.2d 889, 909-10 (1988), *receded from on other grounds*, *State v. Gentry*, 125 Wash.2d 570, 888 P.2d 1105 (1995) (concluding that capital defendant who attempted suicide was voluntarily absent and waived due process right to be present at the return of the verdict). In a similar way, a state court can determine – not unreasonably, we believe – that the idea of forfeiture applies to defendants who, in effect, intentionally absent themselves from their trial by self-inducing their incompetence.

We know that the Supreme Court in *Pate v. Robinson* stated that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." 383 U.S. 375, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966). But, in *Pate*, no allegation was made that the defendant *induced* his own incompetency. Instead, the state argued in *Pate* that the defendant had failed to request properly a competency hearing. Here, the State argues that Moore's intentional, affirmative act – his refusal to eat and to drink – induced his alleged incompetence at trial. Furthermore, as discussed below, it was reasonable for the state court to find that Moore did so with the "calculated" intent of disrupting his trial. *Cf. Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975) (concluding that an insufficient inquiry had been made into petitioner's competence to stand trial in the light of petitioner's suicide attempt by a self-inflicted gunshot wound and other conduct. But noting that a suicide attempt need not always signal incompetency to stand trial).

Moore asserts that, because he was being tried for a capital crime, his presence at trial is non-waivable. The argument that a capital defendant cannot waive his right to be present at trial essentially comes from three Supreme Court cases: *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912); *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884).

In *Hopt* and *Lewis*, cases which involved capital defendants, the Supreme Court suggested that a nonwaivable right of presence exists generally in a criminal case. Over time, however, the rule announced in these cases has been eroded to an extent that it is no longer clear that they are good law at all.

In *Diaz*, a non-capital case, the Supreme Court rejected the "broad dicta" of *Hopt* and *Lewis;* and the Court concluded that, if an offense was not a capital offense, a defendant's voluntary absence could operate as a waiver of his right to be present. 32 S.Ct. at 255. Later, in *Snyder v. Massachusetts*, a capital case, the Supreme Court again noted that the statements in *Hopt* and *Lewis* about the presence of a defendant were "dictum, and no more" and wrote that the privilege of presence "may be lost by consent or at times even by misconduct." 291 U.S. 97, 54 S.Ct. 330, 332 & 336 n. 2, 78 L.Ed. 674 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). In *Allen*, the Supreme Court stated that "[t]he broad dicta in *Hopt* . . . and *Lewis* . . . that a trial can never continue in the defendant's absence have been expressly rejected." *Allen*, 90 S.Ct. at 1060. Finally, in *Drope*, the Supreme Court specifically reserved the question of whether a capital defendant could waive his right to be present stating that "[o]ur resolution of the first issue . . . makes it unnecessary to decide whether, as [the defendant] contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence. . . . " 95 S.Ct. at 909 (citing *Diaz*, 32 S.Ct. at 251). Given the history, the language in *Drope* can justify this conclusion on the part of an objectively reasonable judge: the issue of whether a defendant must be present at all times in a capital trial has not yet been settled by the Supreme Court.

Based upon the lack of clarity of the Supreme Court precedents, we cannot conclude that the state court's determination that a capital defendant in Alabama can forfeit his right to be competent – that is mentally present – at trial was contrary to or was an unreasonable application of clearly established Supreme Court precedent.[9] *See*

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[9] This Court, citing *Diaz* and *Hopt*, has written that the Supreme Court had said that capital defendants could not waive their right to be present at trial. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1257-58 (11th Cir.1982), *modified*, 706 F.2d 311 (1983); *see also Hall v. Wainwright*, 733 F.2d 766, 775-76 (11th Cir.1984) (reading *Proffitt* as prohibiting a capital defendant from waiving his right to be present, but remanding for further development of record regarding waiver of right to be present).

We, however, note that *Proffitt* and *Hall* were decided before Congress enacted the AEDPA which provides for a far more deferential federal review of state court decisions. *See Putman v. Head*, 268 F.3d 1223, 1247 n. 23 (11th Cir.2001), *cert. denied*, 537 U.S. 870, 123 S.Ct.

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L'Abbe v. DiPaolo, 311 F.3d 93, 97-99 (1st Cir.2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1593, 155 L.Ed.2d 330 (2003) (concluding that state court's conclusion that capital defendant could waive right to be present at trial not contrary to or an unreasonable application of Supreme Court precedent).

Neither was the state court's determination that Moore's incompetence was self-induced in a "concerted" and "calculated" manner an unreasonable determination of the facts. The Rule 32 court also describes Moore's acts during the time of his trial as "a calculated trial strategy." We understand from the state court's words, in the context of the total Rule 32 order, that Moore intended to make himself mentally or physically incompetent to stand trial. The Rule 32 court's words like "calculated" tell us that the Rule 32 court found Moore had the power to think, to reason, and to plan about how to get a mistrial: Moore competently and purposefully embarked on a process that would result in his becoming incompetent or otherwise absent from the trial.

278, 154 L.Ed.2d 119 (2002). We now can only interfere with the state court's decision if it is contrary to or applies clearly established federal law as determined by the Supreme Court of the United States in an "objectively unreasonable" manner. "Clearly established federal law is *not* the case law of the lower federal courts, including this Court." *Id.* at 1241. Rather, "clearly established Federal law 'refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Hall v. Head*, 310 F.3d 683, 691 (11th Cir.2002), *petition for cert. filed*, (U.S. June 6, 2003) (No. 03-5741) (quoting *Williams*, 120 S.Ct. at 1523) (alteration in original). For more background about AEDPA's limits on federal court authority, see *Hawkins v. Alabama*, 318 F.3d 1302 (11th Cir.2003).

Dr. Brodsky testified at Moore's Rule 32 hearing that it was *not* Moore's depression alone that made Moore incompetent: instead it – according to Dr. Brodsky – was Moore's failure to eat and to drink that rendered Moore incompetent on the two days in question. Although Dr. Brodsky testified that he, from the vantage of hindsight, believed that Moore's refusal to eat was due to his profound depression and that Moore was not malingering, Dr. Nagi, (who evaluated Moore during the trial's course) found Moore competent before Moore refused food and drink and testified that Moore expressed concern about the venue in which his case was being tried. Moore indicated to Dr. Nagi that Moore desired a mistrial: "I'm very frustrated. What do you want me to do – shoot the jury to have it mistried?" Furthermore, the evidence reflects that Moore only stopped eating upon being removed from the hospital (following his suicide attempt) and taken to the county jail to resume his trial.

Based upon the evidence presented, the state court's determination – finding and concluding that Moore "undertook a calculated and concerted effort to disrupt his capital murder trial" and that Moore, thus, forfeited his right to be competent at the trial – was not an unreasonable determination of the facts or an unreasonable application of clearly established Supreme Court law. *See generally* 28 U.S.C. § 2254(d).

2. *Procedural Due Process and Ineffective Assistance of Counsel*

A defendant who was at the pertinent time competent to stand trial is not entitled to a new trial on the procedural ground that the trial judge in his initial trial failed to hold a competency hearing. *James v. Singletary*, 957

F.2d 1562, 1571-72 (11th Cir.1992) (failure to hold competency hearing harmless error if defendant was competent at the time of trial). In a similar way, defense lawyers cannot have improperly prejudiced a defendant – depriving him of his constitutional right to counsel – by not asserting the need for (or appealing about) a competency hearing when the defendant was, in fact, competent for the pertinent period.

The Alabama Rule 32 court decided that Moore was, in legal effect, competent because his incompetency – if any in fact – was caused by his concerted and calculated strategy of avoiding food and drink to stop the trial: Moore, by his own conduct, forfeited his right to be competent at trial. This decision was not an unreasonable one in the light of Supreme Court precedent, so, Moore's other claims must also fail. If he was, in effect, competent, the failure of lawyers to ask for or of the trial court to hold a competency hearing cannot be prejudicial enough to justify habeas relief.[10]

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[10] Although the evidence established that Moore refused to eat or to drink, no evidence shows that the trial court was aware of this fact until Moore was taken to the hospital on the evening of 1 September, that is after the trial days which are the focus of Moore's incompetency claim. Neither does the evidence reflect that Moore's appearance and acts at trial raised a "bona fide doubt" about his competency. Although two reporters, a sheriff's deputy, and Moore's mother testified that Moore exhibited weakness and lethargy during the trial, this situation – even if observed by the trial court – would not necessarily lead a reasonable trial judge to question Moore's competency. After Moore's suicide attempt, the trial judge ordered a competency evaluation and was assured by Dr. Nagi that Moore was competent to stand trial. A trial judge reasonably could have concluded that Moore's weakness was the after-effects of his suicide attempt. We agree with the district court

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CONCLUSION

For the foregoing reasons, the district court's order denying Moore's petition for habeas corpus is AFFIRMED.

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that Moore failed to establish that the evidence before the state trial court established a "bona fide doubt" regarding Moore's competency to stand trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CAYCE COLLINS MOORE,
Petitioner
vs.
MICHAEL HALEY,
Commissioner of the Alabama
Department of Corrections,
and THE ATTORNEY
GENERAL OF THE STATE OF
ALABAMA,
Respondents

CASE NO.
CV99-HCD-2693-M

REPORT AND RECOMMENDATION

(Filed Dec. 18, 2001)

Petitioner, Cayce Collins Moore, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges the validity of his 1987 conviction in the Circuit Court of St. Clair County for capital murder and resulting sentence of life imprisonment without parole. Petitioner's conviction and sentence were affirmed on appeal without opinion by the Alabama Court of Criminal Appeals. *Moore v. State*, 546 So.2d 404 (Ala.Crim.App. 1989). His petition for writ of certiorari to the Alabama Supreme Court was denied on August 4, 1989. *Ex Parte Moore*, 549 So.2d 1363 (Ala. 1989).

On April 24, 1997, petitioner filed a petition for post-conviction relief in State court pursuant to Rule 32, Ala.R.Crim.P. The petition alleged, *inter alia*, that (a) petitioner was mentally incompetent during a portion of his capital murder trial (a substantive incompetence claim); (b) the trial judge had substantial evidence before the court that raised a reasonable doubt as to petitioner's competency to stand trial and should have held a hearing *ex mero motu* (a procedural incompetency or *Pate* claim); and (c) petitioner's defense counsel was ineffective in failing to request a competency hearing, failing to move for a mistrial based on petitioner's obvious incompetency, and failing to appeal the trial court's failure to hold a competency hearing (ineffective assistance claim).

Respondents asserted in their answer that petitioner's claims that the trial court failed to order a competency hearing and that his counsel was ineffective at trial and on appeal were procedurally barred under Ala.R.Crim.P. 32.2(a)(3) and (a)(5), as claims that could have been raised at trial or on appeal. Respondents also asserted that, even assuming trial counsel was ineffective, petitioner suffered no prejudice.

The trial court held an evidentiary hearing on October 16, 1998. Thereafter, the court denied the post-conviction petition, rejecting petitioner's competency claims without addressing his ineffective assistance claim.

On August 20, 1999, the Alabama Court of Criminal Appeals affirmed the trial court's decision on the basis that petitioner's claims, that he was incompetent to stand trial and that the trial court erred when it failed to hold a competency hearing after petitioner attempted suicide and refused to eat or drink during the trial, were barred under Ala.R.Crim.P. 32.2 (a)(3) and (a)(5). Though not raised by the State as an affirmative defense in the circuit court proceeding, the appellate court also held that these claims were time-barred for failure to file the Rule 32 petition within two years as required by Ala.R.Crim.P. 32.2(c). In addition, the appellate court held that petitioner's ineffective assistance claims also were time-barred under Rule 32.2(c). Because it found petitioner's claims to be procedurally barred, the appellate court declined to consider petitioner's claims on their merits.

Moore petitioned the Alabama Supreme Court for a writ of certiorari on September 22, 1999. Petitioner then filed the present action under 28 U.S.C. § 2254 on October 6, 1999, before the Alabama Supreme Court ruled on his petition for writ of certiorari, in order to preserve his claim in light of the one-year period of limitations imposed by 28 U.S.C. § 2244(d)(1). Subsequently, the Alabama Supreme Court denied the petition for writ of certiorari.

In his habeas corpus petition, Moore sets out certain facts which he asserts show that the trial court's denial of his Rule 32 petition was clearly erroneous and in violation of federal law. In their answer, respondents initially did not directly respond to these allegations, relying only on their claims that the petition should be denied for two procedural reasons. However, respondents do address the merits of petitioner's claims in their reply brief. The court will address respondents' procedural arguments first.

Respondents state that the first reason Moore's petition should be denied is that the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1) expired before petitioner filed his Rule 32 petition on April 24, 1997. Petitioner's direct appeal became final on August 4, 1989. Therefore, respondents assert that petitioner had one year after the enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) on April 24, 1996, to file a federal petition or toll the running of the statute by properly filing a state petition for relief. Respondents, citing *Wilcox v. Florida Department of Corrections*, 158 F.3d 1209, 1211 (11th Cir. 1998), and *Goodman v. United States*, 151 F.3d 1335 (11th Cir. 1998), claim that this one-year period expired on April 23, 1997, one day before petitioner filed his Rule 32 petition in state court.

Citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), respondents assert as their second reason for rejecting Moore's petition that, even if not barred by the limitations period of 28 U.S.C. § 2244(d)(1), petitioner's claims are procedurally defaulted for failure to raise them on appeal as required under Ala.R.Crim.P. 32.2(a)(3), and for failure to assert these claims within the two-year period of limitations contained in Rule 32.2(c). Respondents claim that petitioner has failed to show "cause and prejudice" for his default in state court or that the failure to hear his claims will result in a "fundamental miscarriage of justice" as required to avoid this procedural bar. *See Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (claims procedurally defaulted in state court can be heard in federal court upon showing of cause for the failure to assert the claim and resulting prejudice to petitioner); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (claim procedurally defaulted in state court may be heard to avoid fundamental miscarriage of justice).

DISCUSSION

Habeas Corpus Statute of Limitations

The cases of *Goodman, supra, Wilcox, supra*, and *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999), each contain language which states that the one-year grace period for filing petitions under 28 U.S.C. § 2254 (or § 2255) expires on April 23, 1997. However, none of these courts was faced with a situation where, as here, the petition was filed on April 24, 1997. Thus, none was faced with the question of whether the last day for filing a federal habeas corpus petition, not otherwise told, is April 23, 1997, or April 24, 1997. The court concludes that the language regarding the final day of the one-year grace period contained in these cases is *dicta* and not binding on this court.

Rule 6(a), Fed.R.Civ.P., provides in pertinent part, "In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . ." Every Court of Appeals to address the issue of the expiration date for the judicially-created grace period directly has applied the general rule for computation of time as set out in Rule 6(a). *See Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999); *Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998); *Hernandez v. Caldwell*, 225 F.3d 435, 439 (4th Cir. 2000); *Flanagan v. Johnson*, 154 F.3d 196, 200-202 (5th Cir. 1998); *Gould v. Jackson*, 208 F.3d 213, 2000 WL 303002 (6th Cir. Mar. 14, 2000) (unpublished); *United Sates v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000); and *Moore v. United States*, 173 F.3d 1131, 1133 (8th Cir. 1999). *See also Housely v. United States*, 1998 WL 668115 (M.D. Fla. Sept. 21, 1998) (holding that the limitations period under the AEDPA expired on April 24, 1997, and noting that the Eleventh Circuit did not squarely address this issue in *Goodman*).

The Eleventh Circuit has consistently held that Rule 6(a) applied to the computation of federal statutes of limitation.

> The law regarding statutes of limitations is clear. Our court has consistently held that the method of Rule 6(a) applies to federal statutes of limitations. *E.g., In re Gotham Provision Co.*, 669 F.2d 1000, 1014 (5th Cir. Unit B) (Packers and Stockyards Act), *cert. denied*, 459 U.S. 858, 103 S.Ct. 129, 74 L.Ed.2d 111 (1982); *Lawson v. Conyers Chrysler, Plymouth, etc.*, 600 F.2d 465, 465-66 (5th Cir. 1979) (Truth in Lending Act). *See also J. Aron & Co. v. S/S Olga Jacob*, 527 F.2d 416, 417 (5th Cir. 1976) (*per curiam*) (complying with "spirit" of Rule 6(a) in Carriage of Goods by Sea Act).

Maahs v. United States, 840 F.2d 863, 865 (11th Cir. 1988) (FTCA case). Although the one-year grace period is a judicially-created equitable extension of the effective date of the AEDPA granted to cases involving prisoners whose conviction became final prior to the effective date of the AEDPA, the undersigned finds the cases cited above to be extremely persuasive and can find no reason to depart from the usual manner of computing time as set forth under Rule 6(a).

Accordingly, the court concludes that Rule 6(a) should be applied to the computation of the one-year grace period for § 2254 petitions filed by prisoners whose convictions became final prior to the AEDPA's effective date and that the last date for filing petitions under the grace period is April 24, 1997, rather than April 23, 1997. As such, Moore's petition was timely filed.

Rule 32.2(c) Statute of Limitations

Respondents also assert that petitioner's claims are due to be dismissed based on certain procedural bars. They claim that petitioner is barred from raising the issues presented in the instant habeas corpus petition because he did not raise them at trial or on appeal in state court, citing Ala.R.Crim.P. 32.2(a)(3) and (a)(5). They also aver that these claims are barred because of his failure to raise them in state court within the two-year statute of limitations set out in Ala.R.Crim.P. 32.2(c).

The contention that petitioner failed to raise his claims at trial or on appeal was asserted by respondents as a defense to petitioner's Rule 32 petition in state court. However, respondents did not assert the Rule 32.2(c) statute of limitations as a defense at that time. The records submitted by the parties reflect that this defense was first asserted at the time of petitioner's appeal of the trial court's rulings in the Rule 32 proceeding. Despite respondents' failure to raise this defense until the time of the Rule 32 appeal, the decision of the Alabama Court of Criminal Appeals was based, in part, on the application of the Rule 32.2(c) statute of limitations.

Petitioner asserts that respondents have waived the statute of limitations defense to his procedural competency claims and his ineffective assistance claims by failing to raise it as a defense in the Rule 32 proceedings before the trial court. He also asserts that his substantive competency claims are not subject to procedural default and that he has shown sufficient cause and prejudice to overcome any procedural default of his procedural competency claims.

Waiver of Rule 32.2(c) Defense

Petitioner alleges, and respondents do not deny, that the issue of the two-year statute of limitations for bringing a petition for post-conviction relief in an Alabama state court proceeding was not raised during the proceedings in the state circuit court. It was raised by respondents for the first time when the denial of the Rule 32 petition was on appeal to the Alabama Court of Criminal Appeals. The records submitted confirm this. Respondents assert that the trial court properly applied the statute of limitations in this case because it is jurisdictional and subject to being raised at any time. As authority for this position, they cite *Williams v. State*, 783 So.2d 135 (Ala.Crim.App. 2000).

As a general rule, a federal court may not review state court decisions on federal claims that rest on state law grounds, including procedural default grounds, that are independent and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. at 729, 111 S.Ct. at 2253-54. In *Coleman*, the Supreme Court stated that in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 750, 111 S.Ct. at 2565. A state procedural rule cannot bar federal habeas review of a claim unless the rule is "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 857, 112 L.Ed.2d 935 (1991) (quoting *James v. Kentucky,* 466 U.S. 341, 348, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346 (1984)); *Cochran v. Herring*, 43 F.3d 1404, 1408 (11th

Cir. 1995), *cert. denied*, 516 U.S. 1073, 116 S.Ct. 776, 133 L.Ed.2d 728 (1996). In order for a state procedural bar to foreclose a federal court from reviewing a federal claim in a § 2254 proceeding, not only must the last state court rendering a judgment in the case comply with the "plain statement" rule, but also the procedural bar must be firmly established and a regularly followed state practice. *Ford v. Georgia*, 498 U.S. at 423-24, 111 S.Ct. at 857. When a state's "procedural default rule has been only sporadically invoked, the procedural default no longer bars consideration of the issue in federal court." *Cochran v. Herring*, 43 F.3d at 1408.

At the time that petitioner filed his § 2254 petition, October 6, 1999, and for many years prior thereto, the Alabama Court of Criminal Appeals rejected limitations bars under Ala.R.Crim.P. 32.2(c) when it was not properly pled by the State. *See Jackson v. State*, 612 So.2d 1356, 1357 (Ala.Crim.App. 1992); *Howard v. State*, 616 So.2d 398, 399 (Ala.Crim.App. 1993). Because asserting the Rule 32 statute of limitations was an affirmative defense, it was held, prior to *Williams*, that it must be affirmatively pled. The *Williams* case cited by respondents specifically overruled the prior holding in *Howard* and similar cases.[1] However, the *Williams* decision was not rendered until October 27, 2000, well after petitioner filed his state petition for collateral relief. Thus, this procedural bar cannot be construed as one which had been "firmly established and regularly followed" at the time of petitioner's Rule 32 proceeding. Therefore, the undersigned magistrate judge finds that petitioner's § 2254 petition is not barred by his failure to assert his claims in state court within the two-year statute of limitations set forth in Ala.R.Crim.P. 32.2(c).

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[1] This action by the Alabama Court of Criminal Appeals seems to be contrary to the holdings of the Alabama Supreme Court in *Ex Parte Rice*, 565 So.2d 606, 608 (Ala. 1990), and the United Sates Supreme Court in *Gray v. Netherland*, 518 U.S. 152, 165-66, 116 S.Ct. 2074, 2083, 135 L.Ed.2d 457 (1996). However, such a determination is unnecessary for the resolution of this issue.

Other Procedural Bars

Within his Rule 32 petition, Moore asserted that "[c]ounsel failed to move for a mistrial based on the petitioner's obvious incompetency after the trial had resumed on August 31, 1987, failed to move the trial court for a competency hearing pursuant to § 15-16-21 [*Code of Alabama* 1975] at that point, and failed to appeal the trial court's failure to hold a competency hearing." Therefore, the issue of ineffective assistance of counsel as to these issues was adequately raised in the Rule 32 petition and is not barred from consideration here.[2]

Procedural and Substantive Incompetency Claims

Petitioner asserts that he became incompetent after the start of his trial, his incompetence was or should have been obvious to the trial judge and that, therefore, the trial judge should have held a hearing on this issue even though none was requested by petitioner's trial counsel.

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[2] Petitioner was represented by the same counsel at trial and on appeal. Therefore, it was not required that he raise the issue of inadequate counsel on direct appeal. *Colston v. Attorney General of State of Alabama*, 947 F.2d 908 (11th Cir. 1991).

Where there is evidence raising a doubt as to the competence of a defendant, a court is required to conduct a sanity hearing. *Pate v. Robinson*, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966). This is "procedural competency." The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. *James v. Singletary*, 957 F.2d 1562, 1569-70 (11th Cir. 1992) (citing *Pate v. Robinson, supra*, and *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). The test for determining competence to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402, 80 S.Ct. at 789.

A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's mental competence was put at issue. *Pate*, 383 U.S. at 385, 86 S.Ct. at 842. To prevail on the procedural claim, "a petitioner must establish that the state trial judge ignored facts raising a 'bona fide doubt' regarding the petitioner's competency to stand trial." *James*, 957 F.2d at 1572 n. 15 (citing *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987)). Even if a defendant is mentally competent at the beginning of his trial, the trial court must continually be alert for changes which would suggest that he is no longer competent. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." *Id. Pate* established "a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing . . . despite information raising a bona fide doubt as to the petitioner's competency," *James*, 957 F.2d at 1570, but the petitioner bears the burden of showing that "objective facts known to the trial court were sufficient to raise a bona fide doubt." *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979). A *Pate* claim "can and must be raised on direct appeal" because an appellate court hearing the claim "may consider only the information before the trial court before and during trial." *James*, 957 F.2d at 1572.

A petitioner may make a "substantive" competency claim by alleging that he was, in fact, tried and convicted while mentally incompetent. *Id.* at 1571. In contrast to a procedural competency claim, however, "a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence." *Id.* A petitioner who presents "clear and convincing evidence" creating a "real, substantial and legitimate doubt" as to his competence to stand trial is entitled to a hearing on his substantive incompetency claim. *Id.* at 1573 (quoting *Fallada*, 819 F.2d at 1568 n.1). To show entitlement to a post-conviction evidentiary hearing on a substantive competency claim, "the standard of proof is high [and] the facts must positively, unequivocally, and clearly generate the legitimate doubt." *Card v. Singletary*, 981 F.2d 481, 484 (11th Cir. 1992) (quotations omitted), *cert. denied*, 510 U.S. 839, 114 S.Ct. 121, 126 L.Ed.2d 86 (1993).

A presumption of correctness attaches to a state court's finding of competence, and a federal habeas court must determine that the finding is not "fairly supported by the record" before it may overturn the state court's decision. *Maggio v. Fulford*, 462 U.S. 111, 117, 103 S.Ct. 2261, 2264, 76 L.Ed.2d 794 (1983); *Card*, 981 F.2d at 484 n.5 (citing *Demosthenes v. Baal*, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990)). A district court's determination that there is insufficient evidence to generate a substantial and legitimate doubt as to a petitioner's competence to stand trial is review for clear error. *Card*, 981 F.2d at 483-84.

"Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Id.* at 487-88 (quoting *United Sates ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir. 1984), *cert. denied*, 469 U.S. 1193, 105 S.Ct. 972, 83 L.Ed.2d 975 (1985)). Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial. *McCune v. Estelle*, 534 F.2d 611, 612 (5th Cir. 1976). The fact that a defendant has been treated with anti-psychotic drugs does not *per se* render him incompetent to stand trial. *Medina v. Singletary*, 59 F.3d 1095, 1106-07 (11th Cir. 1995) (citing *Fallada*, 819 F.2d at 1569).

Petitioner does not contest respondents' claim that he failed to raise the issue of procedural incompetency on direct appeal. If a state prisoner fails to raise a claim in state court, or attempts to raise a claim in an improper manner, and state procedural rules preclude the state courts from hearing the merits of the claim, then the federal habeas court also is precluded from hearing its merits, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. at 80-88, 97 S.Ct. at 2503-07. "Where the state court correctly applies a procedural default principle of state law, *Sykes* requires the federal court to abide by the state court's decision." *Harmon v. Barton*, 894 F.2d 1268, 1270 (11th Cir.), *cert. denied*, 498 U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 68 (1990). To show cause for procedural default, the petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Under Alabama law, a petitioner is not entitled to collateral relief for a claim which could or should have been raised at trial and, if preserved, on direct appeal of the judgment and sentence. *Holladay v. Haley*, 209 F.3d 1243 (11th Cir. 2000).

Petitioner asserts that he can show both "cause" and "prejudice" for the procedural default of his procedural incompetency claim. He asserts ineffective assistance of counsel at trial and on direct appeal as "cause" and the fact of his procedural default of this claim in his federal habeas proceeding as "prejudice." Respondents deny that petitioner received ineffective assistance of counsel.

The *Sykes* procedural default rule does not, however, preclude review on the merits on a post-conviction (substantive) incompetency claim, even if the claim was not raised on direct appeal. *Medina*, 59 F.3d at 1107 (citing *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985), and *Pate*, 383 U.S. at 386, 86 S.Ct. at 841). Respondents assert that, even assuming petitioner's substantive incompetency claim has not been procedurally defaulted, the evidence does not support a claim of mental incompetency, that he is not entitled to relief because the incompetency was self-induced, and that the federal court is bound by the state trial court's findings of fact entered after the Rule 32 hearing.

Thus, the remaining issues are (1) whether the failure to raise the issue of petitioner's mid-trial incompetence at trial or on appeal is sufficient cause and the procedural default of this claim in federal court is sufficient prejudice to allow petitioner to avoid the procedural bar asserted by respondents; and (2) whether petitioner has presented clear and convincing evidence that the Rule 32 judge's findings of fact are incorrect and resulted in a decision that was contrary to, or an unreasonable application of, clearly established Supreme Court law or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d) and (e)(1).

Obviously, if the Rule 32 court's determination was not erroneous, then trial and appellate counsel could not have been ineffective for failing to raise the issue at trial or on appeal. *See, e.g., Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir. 1982); *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984) (counsel cannot be ineffective for failure to raise a meritless issue on appeal); *Pitts v. Cook*, 923 F.2d 1568, 1573-74 (11th Cir. 1991) (counsel not ineffective for failing to raise a *Batson* claim prior to the decision in *Batson*).

The findings of fact made by the Rule 32 judge (who was not the same as the trial judge) are as follows:

> 1. The Petitioner, Cayce Collins Moore was convicted of the offense of capital murder, intentional murder during robbery in the 1st degree, under Code of Alabama (1975) § 13A-5-40(a)(20).

2. On February 24, 1989 the Alabama Court of Criminal Appeals affirmed the defendant's conviction without opinion. A petition for writ of certiorari to the Alabama Supreme Court was denied on August 4, 1989.

3. Prior to the trial the defendant was evaluated at Taylor Hardin Secure Mental Facility. The evaluation noted the defendant's depression, but even with such notations the defendant was found to be competent to stand trial. The defendant was at Taylor Hardin for evaluation for a period of over a month.

4. The Moore's [sic] capital murder trial began on August 10, 1987. On the night of august 16, 1997 [sic] the defendant took and [sic] overdose of a medication. The defendant remained at Baptist Montclair Hospital for a period of 10 days. The defendant was examined by Dr. Kamal A. Nagi at Baptist Montclair at the request of the trial judge, Hon. Carl D. NeSmith. The defendant related to Dr. Nagi that he was attempting, through his actions to get the trial moved from Ashville. Dr. Nagai [sic] found that the defendant was competent to stand trial after the overdose.

5. After the defendant's overdose, his bond was revoked and the defendant was confined to the St. Clair County Jail. At that time the defendant began a hunger strike.

6. On the night of September 1, 1987, Moore was once again taken to the hospital, this time St. Clair Regional in Pell City. Moore was seen on the bed drinking liquids at that time. At various times during the trial Moore was seen either eating and drinking.

7. The defendant's expert, Dr. James Lewis, testified in this Rule 32 hearing as to the effects of water depletion and food deprivation. Dr. Lewis's testimony was based on an interview with the defendant more than 10 years after the fact. Dr. Lewis testified that it would be difficult for a physician to say, without seeing the person, that there was any disorientation as a result of lack of food or water.

8. Dr. Stanley Brodsky testified for the defendant at this Rule 32 hearing. Dr. Brodsky performed what he termed a "Retrospective Competency to Stand Trial" evaluation. Based on his review of the records and news reports from over 10 years prior, Dr. Brodsky formed the opinion that Cayce Moore "did not show the ability to meet the psychological understandings of being competent to stand trial."

9. The petitioner, Cayce Moore was not present to testify at this Rule 32 hearing. His attorney at trial is deceased. There were no motions filed in the original trial concerning Moore's inability to effectively assist counsel due to a lack of food or water. The judge presiding over the trial and seeing the defendant first hand on a daily basis in the trial did not find it necessary to address the defendant's inability to assist counsel. Judge NeSmith had not shown an unwillingness to allow Moore the time necessary to recuperate from his overdose. Judge NeSmith had recessed the trial for 10 days until Dr. Nagi assured him that Moore was competent to proceed.

10. This court finds that the defendant Cayce Moore was competent to stand trial and

> was able to effectively aid and assist his counsel in his defense during his capital murder trial.

[Doc. #10 at 83-85].

Based on these findings, the Rule 32 court found that the evidence reflected that petitioner undertook a calculated effort to disrupt his capital murder trial. The court found that petitioner delayed the trial for ten days by intentionally taking a drug overdose. When this did not work, the court found that he began a hunger strike. The Rule 32 judge stated that "[d]espite his best efforts, Moore did consume food and drink at times during the trial." [*Id.* at 85]. While finding that Moore did, in fact, obtain food and liquids at times during the trial, the court found that petitioner's asserted grounds, that he was mentally unable to assist his counsel due to self-induced deprivation of food and drink, "are much like a disruptive defendant who is excluded from the Courtroom." [*Id.* at 87]. Citing *Ex parte Jackson*, 674 So.2d 1365 (Ala. 1994); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970), and *Hayes v. State*, 340 So.2d 1142 (Ala.Crim.App. 1976), the court held that a party whose own actions cause him to be absent from trial cannot claim error and cannot create grounds for a mistrial by his own actions. [*Id.*]

The record evidence reflects that petitioner's capital murder trial began in early August 1987. Prior to trial, he was examined by mental health professionals and found competent to stand trial. On or about August 17, 1987, midway through trial, petitioner attempted suicide by taking an overdose of drugs. He was hospitalized for ten days, and the trial was delayed during that time. After he was released from the hospital on August 27, 1987, the trial judge revoked petitioner's bond and placed him in the custody of the St. Clair County Jail, where he remained until the trial resumed on August 31, 1987. It is undisputed that for a five-day period following his removal from the hospital, from August 27 until the evening of September 1, 1987, Moore refused to take any food or drink. On the evening of August 31, 1987, petitioner was taken by jail authorities to a local physician because of his weakened condition. However, he refused treatment. On the evening of September 1, 1987, petitioner collapsed in his cell and was subsequently hospitalized for severe dehydration and volume depletion. Petitioner asserts that, as a result of this self-induced starvation, he was incompetent to stand trial on August 31 and September 1, 1987.

At the Rule 32 proceeding, petitioner presented evidence that two reporters who covered the trial had reported in five separate news articles published during the trial that Moore was "out of it," "disoriented," and "confused" on August 31 and September 1, 1987. These reporters testified that during these two days, he sat slumped in his chair with his head sometimes supported by his mother and that he was physically supported by courtroom deputies when entering and leaving the courtroom because of his weakened condition.

A jail inmate testified that, during this time period, petitioner refused to eat or drink anything and, on August 31 and September 1, 1987, the inmate had to help Moore bathe and dress for court because he was took weak to do so himself. Likewise, petitioner's mother described her son on September 1, 1987 as "[a]lmost lifeless, pale – not really responding to me." She stated that after he was hospitalized on September 1, when she offered him some water, he stated "We'll just go to the Galleria and get some orange spice tea."

Petitioner also presented the medical testimony of Dr. James Lewis, a Professor of Medicine at the UAB Medical School, who testified that the failure to eat or drink for four days will lead to severe dehydration, resulting in the shrinkage of the fluid outside the brain cells. This shrinkage results in the inability of the brain to function properly, causing confusion, disorientation, listlessness, and stupor. Dr. Lewis testified that a severely dehydrated person could have trouble understanding things going on around them and severe dehydration could affect a person's ability to engage in a conversation with another person (*i.e.*, his attorneys). [Doc. #10, Rule 32 Hearing Transcript, at 9-11].

A forensic psychologist, Dr. Stanley Brodsky, reviewed the medical records from the Baptist Medical Center, a letter from one of petitioner's attending physicians in 1987 expressing concern that petitioner remained suicidal even after his release from the hospital on August 27, 1987, the affidavit of Moore's psychiatric expert at petitioner's trial, and the news articles referenced above describing Moore's condition on August 31 and September 1, 1987. He also spoke with petitioner's mother and listened to all of the trial testimony from the Rule 32 proceeding. Based on this, Dr. Brodsky concluded that Moore was "seriously and substantially impaired in his ability to understand proceedings rationally; to consult with his attorneys and aid in his defense." [*Id.* at 69]. He also stated that petitioner "was not able to even understand what was going on, follow what was going on, or to work with his attorneys in his own defense." [*Id.* at 71].

The only evidence presented by the State was from a St. Clair County sheriff's deputy (Terry Surles) and the St. Clair County District Attorney. The deputy testified that, while they assisted Moore in walking to the courtroom from the jail, they did not have to hold him up and Moore could walk on his own. He stated that he understood that Moore was weak and needed some assistance. [*Id.* at 106-108]. The deputy also testified that, while Moore was weak because he refused to eat or drink anything, he did observe him drink water at the defense table during the trial. However, he could not recall whether this was before or after the period when Moore refused to eat or drink. [*Id.* at 109].

St. Clair County District Attorney Van Davis, who prosecuted petitioner, testified that he observed Moore during the two days in question and recalled seeing Moore communicating with his attorneys and that he appeared to know what was going on. [*Id.* at 113-14]. However, Davis could not recall whether he had observed Moore talking to his lawyers on the relevant dates of August 31 and September 1, 1987. [*Id.* at 122-24].

The State also makes reference to the testimony of Dr. Kamal Nagi, a state psychiatrist who testified at trial that Moore was not insane at the time he committed the charged offense. However, Dr. Nagi had not spoken to Moore since he was released from the hospital after his first suicide attempt and was unaware that Moore had refused to eat or drink after leaving the hospital, resulting in treatment for dehydration and starvation ketosis on September 1, 1987. Thus, Dr. Nagi's testimony provided nothing enlightening regarding petitioner's competence on the two relevant days. Trial counsel for petitioner is deceased and, thus, could not present testimony. The trial judge also did not testify or provide any evidence at this hearing.

Counsel for petitioner assets [sic] that the above testimony overwhelmingly establishes that during a critical part of petitioner's murder trial, when the defense was presenting its case, Moore did not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding nor did he have a rational as well as factual understanding of the proceedings against him.

Some of the findings of fact by the Rule 32 judge are either incorrect, irrelevant, or too speculative to have been considered. The Rule 32 judge found that the conclusions of Dr. James Lewis were based on an interview with the defendant more than ten years after the fact and further found that Dr. Lewis testified that it would be difficult for a physician to say, without seeing the person, that there was any disorientation as a result of lack of food or water. This conclusion is incorrect.

Dr. Lewis's testimony reflected the physiological effects of dehydration and starvation which includes potential inability to communicate, disorientation, and physical problems. He testified that the physical signs of these conditions include pale skin, physical weakness, listlessness, breath that smells of ketone, [*id.* at 7], disorientation [*id.* at 8], and confusion and disorientation. [*Id.* at 9]. Dr. Lewis did not testify that, without seeing the patient, it would be difficult for a physician to determine if there was any disorientation but, rather, that he could not conclude that a symptom such as disorientation, standing alone, was caused by lack of water. [*Id.* at 7-14]. However, he further stated that, assuming the patient was listless, disoriented, confused, smelled of ketones ***and*** had not eaten or drunk anything for four days, he would draw a medical conclusion that this person was either dehydrated or volume depleted. [*Id.* at 15-16]. It goes without saying that it would be difficult for any physician to reach a conclusion about anything without first seeing the patient. However, given the facts provided to Dr. Lewis and considering his expertise in this area, and the absence of evidence refuting his conclusions, the Rule 32 judge appears to have been too quick in disregarding this testimony.

The Rule 32 judge likewise rejected the opinion of Dr. Brodsky that petitioner's condition was such that, on August 31 and September 1, 1987, he was unable to meet the psychological understandings of being competent to stand trial. He appears to have rejected these conclusions because Dr. Brodsky based them on a review of medical records and news reports from over ten years before. However, in addition to reviewing these records and articles, Dr. Brodsky also listened to the testimony of the other witnesses at the Rule 32 proceedings, including the two reporters, the sheriff's deputy, the district attorney and the petitioner's mother, regarding petitioner's physical and mental condition on the two days in question.

The fact that Dr. Brodsky reviewed the medical records and newspaper reports ten years after the trial is an insufficient basis, standing alone, for rejecting his conclusions. Whether this review was performed ten years or ten minutes after the trial, the facts remain the same. As was the case with Dr. Lewis, it appears that the Rule 32 judge was too quick in disregarding Dr. Brodsky's testimony given the expertise of the witness, the factual basis on which he based his conclusions and, as will be set out below, the total absence of evidence refuting his testimony.

In support of the denial of the Rule 32 petitioner, the judge relied, in part, on the fact that trial counsel did not file any motions concerning Moore's inability to effectively assist counsel due to lack of water. However, it is precisely for this reason that petitioner now claims that trial counsel was ineffective. Therefore, it is circular reasoning for the Rule 32 court to conclude that trial counsel's failure to file a motion regarding a client's competence is evidence that trial counsel was not ineffective for failing to file this same motion. Yet, that is what the Rule 32 judge has done here.

The Rule 32 judge also considered as evidence that the trial judge "presiding over the trial and seeing the defendant first hand on a daily basis in the trial did not find it necessary to address the defendant's ability to assist counsel." However, this is a conclusion by the Rule 32 judge not supported by any evidence. The trial judge was not called as a witness, nor did he submit an affidavit or other evidence regarding Moore's trial. It is clear that the trial judge did not address the defendant's competence, but there is no evidence that this occurred because he considered it unnecessary to do so.

In addition, the fact that the trial judge did not proceed with the trial after petitioner's August 17 suicide attempt until Dr. Nagi assured him that Moore was competent to proceed, is irrelevant. Dr. Nagi assured the trial judge that petitioner was competent prior to his release from the hospital and prior to petitioner's failure to eat or drink anything for five days thereafter. In fact, Dr. Nagi was totally unaware that petitioner had done this until the Rule 32 hearing. Therefore, he provides no basis for the court to conclude that petitioner was competent to stand trial on August 31 and September 1, 1987.

Finally, the Rule 32 judge concluded that, "[d]espite his best efforts, Moore did consume food and drink at times during the trial." There is no question that, at some point during his trial, petitioner ate, drank and communicated with his attorneys. However, there is no firm evidence that he consumed any food or water between August 27 and September 1, 1987. The testimony of the sheriff's deputy clearly reflects that petitioner was in need of assistance in getting in and out of the courtroom, although the degree of assistance required is in dispute. When District Attorney Van Davis was asked if petitioner acted any differently during the two days in issue, he responded "Not that I remember." [*Id.* at 114-15]. Likewise, he admits that he did not talk to petitioner during this time or hear him talk to anyone. [*Id.* at 115]. Furthermore, he could not say that he observed petitioner communicating with his attorneys specifically on August 31 or September 1, 1987. He was unable to be any more specific as to when he observed petitioner engaged in conversations with his attorneys other than to say that it occurred "throughout the trial." [*Id.* at 122]. *See also id.* at 124 ("I cannot distinguish the first day from the rest of the days.").

The court concludes that petitioner presented substantial evidence at the Rule 32 proceeding that he was incompetent during two days of his trial and that respondents have failed to present any evidence to refute petitioner's evidence. Therefore, the Rule 32 judge's determination that Moore was competent throughout his trial and was able to effectively aid and assist his counsel in his defense is an unreasonable determination of the facts in light of the evidence presented at the State court proceedings.

However, in order to prevail on a claim of procedural incompetency, petitioner must show not only that he was incompetent to stand trial but, also, that the state trial judge ignored facts raising a "bona fide doubt" regarding petitioner's competency to stand trial. *James v. Singletary*, 957 F.2d 1562, 1572 n.15 (11th Cir. 1992) (*citing Pate v. Robinson*, 383 U.S. at 384-86, 86 S. Ct. at 841-42). While there is sufficient, unrebutted evidence that petitioner was, in fact, incompetent on August 31 and September 1, 1987, there is very little evidence that this fact was brought to the attention of the trial court. While two reporters, a sheriff's deputy and petitioner's mother testified that petitioner exhibited some degree of physical weakness and lethargy during the trial, this would not lead a reasonable trial judge to conclude that a mid-trial competency hearing was in order. Petitioner had just recovered from a ten-day hospital stay as the result of a serious suicide attempt. The trial judge had been assured by a physician that petitioner, at the time of his release from the hospital, was competent to continue his trial. There has been no evidence presented which reflects that petitioner's refusal to eat or drink between the time he was released from the hospital and the time trial resumed four days later was communicated to the trial judge.[3] Therefore, it would have been reasonable for the trial judge to conclude that petitioner's weakness and lethargy were after-affects [sic] of his suicide attempt but that he was competent to stand trial. Therefore, the undersigned magistrate judge concludes that petitioner has failed to establish that the trial court erred when it failed to hold a competency hearing mid-trial. *See also, Medina*, 59 F.3d at 1107 (Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges. . . . Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial (internal quotes and citations omitted)).

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[3] In Petitioner's Response to State's Answer to Federal Habeas Corpus Petition, counsel for petitioner asserts that "[t]he trial court knew all these facts during the murder trial." [Doc. #15 at 31]. However, counsel has failed to point to any evidence in the record to support this.

Having determined that respondents have failed to present any significant evidence to refute petitioner's evidence that established his substantive incompetence on August 31 and September 1, 1987, the remaining issue to be determined is whether trial counsel's failure to raise this issue at trial or on appeal amounts to ineffective assistance.

The Eleventh Circuit has stated that "under certain circumstances, trial counsel's failure to apprise the court of a client's changing mental state – thereby depriving the court of critical information regarding its *own* potential duty to hold a *Pate v. Robinson* hearing – can constitute ineffective assistance." *Johnston v. Singletary*, 162 F.3d 630, 635 (11th Cir. 1998). It is well-established that the Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. *Dusky, supra*.

> A substantive incompetency claim implicates the Fourteenth Amendment's prohibition against deprivations of life, liberty, or property without due process of law by identifying a specific deprivation. While such a claim assigns responsibility

> for the deprivation to the state, it need not assign responsibility for the absence of due process to the state as well. To try an incompetent defendant makes for an undue process regardless whether or not any person, state actor or not, could or should have diagnosed the defendant's incompetency. This absence of due process blossoms into a constitutional violation if it occurred during a proceeding in which the state deprived a person of life, liberty, or property. In short, a substantive incompetency claim based on the Due Process Clause of the Fourteenth Amendment requires an allegation of state action, not of state misconduct.

James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992).

The test for determining competence to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402, 80 S.Ct. at 789. The testimony presented at the Rule 32 hearing reflects that petitioner was exhibiting the physical indicia of his self-induced starvation and dehydration. Medical testimony, based on a reconstruction of these events ten years after the fact from petitioner's medical expert, concluded that petitioner was unable to consult with his lawyer or understand the proceedings against him.

Presumably, if petitioner had been unable to communicate with his lawyers, they would have brought it to the attention of the trial judge. However, such a conclusion is purely speculative. To make matters worse, lead trial counsel is deceased, and the location of co-counsel is unknown to the court. Thus, the only person who can shed any light on petitioner's actual ability to communicate with his lawyers is petitioner himself, and he has not done so. Nevertheless, the testimony of those who directly communicated with petitioner during this time, his mother and a cell-mate, reflect that he was suffering physically and mentally from the effects of his actions. Likewise, reporters covering the trial and observing him inside and outside the courtroom described petitioner as "out of it," "disoriented," and "confused."

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-prong test to evaluate ineffective assistance claims. To obtain reversal of a conviction, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant and resulted in an unreliable or fundamentally unfair outcome of the proceeding. *Id.* at 687-88, 104 S.Ct. at 2064-65.

Without question, an attorney who is aware that his client is incompetent to stand trial but, nevertheless, fails to bring it to the attention of the trial judge has performed in a manner which falls below an objective standard of reasonableness. The same is true regarding trial counsel's failure to present this issue on appeal.

The question thus remaining is whether counsel's deficient performance prejudiced Moore in a manner that resulted in an unreliable or fundamentally unfair outcome of the proceeding. The undersigned magistrate judge finds that it did not. Prior to his suicide attempt and his refusal to eat or drink, petitioner had expressed reservations about his ability to get a fair trial and asked a physician who examined him for competency before trial if he had to "shoot the jury" to have the case mis-tried. The physician found petitioner competent to stand trial. Thereafter, petitioner took an overdose of drugs which delayed the trial for ten days. He then refused to eat or drink, resulting in his collapse in his cell on the second day after his trial resumed.

The right to assistance of counsel is a fundamental right. However, even that right "may not be put to service as a means of delaying or trifling with the court." *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979),[4] *cert. denied*, 445 U.S. 950, 100 S.Ct. 1599, 63 L.Ed.2d 785 (1980). In *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995), the Eleventh Circuit stated:

> Courts thus have recognized that a criminal defendant may forfeit constitutional rights by virtue of his or her actions. The Sixth Amendment right to counsel, for example, may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed *pro se*. *See Fowler*, 605 F.2d at 183. Additionally, a defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Foster v. Wainwright*, 686 F.2d 1382, 1388-89 (11th Cir. 1982), *cert. denied*, 459 U.S. 1213, 103 S.Ct. 1209, 75 L.Ed.2d 449 (1983). A defendant who causes a witness to be

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[4] The Eleventh Circuit, in the *en banc* decision of *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

> unavailable for trial forfeits his right to confrontation. *See United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. Unit B 1982), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). A defendant who escapes from custody during his trial waives his Sixth Amendment rights to be present and to confront witnesses during the trial. *See Golden v. Newsome*, 755 F.2d 1478, 1481 (11th Cir. 1985).

53 F.3d at 325 (footnotes omitted). By analogy, a defendant who self-imposes a state of incompetency on himself for the purpose of "delaying or trifling with the court" forfeits his right to be competent when tried. That is precisely what petitioner has done here. Having forfeited his right to be competent during trial, neither trial nor appellate counsel were ineffective for failing to raise the issue. Therefore, the magistrate judge RECOMMENDS that the petition for a writ of habeas corpus be DENIED.

NOTICE OF RIGHT TO OBJECT

Any party who objects to this report and recommendation must, within fifteen (15) days of the date on which it is entered, file specific written objections with the clerk of this court. Failure to do so will bar any later challenge or review of the factual findings of the magistrate judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied*, 474 U.S. 1111, 106 S. Ct. 899, 88 L.Ed.2d 933 (1986); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (*en banc*). In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a district judge.

A party may not appeal a magistrate judge's recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

DONE this 18th day of December, 2001.

/s/ Harwell G. Davis, III
HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CAYCE COLLINS MOORE, Petitioner vs. MICHAEL HALEY, Commissioner of the Alabama Department of Corrections, and THE ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents	)	CASE NO. CV99-G-2693-M

FINAL JUDGMENT

(Filed Jan. 31, 2002)

On December 18, 2001, the magistrate judge's report and recommendation was entered and the parties were allowed therein fifteen (15) days in which to file objections to the recommendations made by the magistrate judge. On January 16, 2002, after obtaining an extension of time, petitioner filed objections to the magistrate judge's report and recommendation. On January 17, 2002, also after obtaining an extension of time, respondents filed objections to the magistrate judge's report and recommendation. On January 23, 2002, petitioner filed a response to respondents' objections.

After careful consideration of the record in this case, the magistrate judge's report and recommendation, the petitioner's and respondents' objections thereto, and the petitioner's response to respondents' objections, the court hereby ADOPTS the report of the magistrate judge. The court further ACCEPTS the recommendations of the magistrate judge and it is, therefore,

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus in this action be and the same hereby is DENIED.

DONE this the 31st day of Jan, 2002.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT ST. CLAIR COUNTY, ALABAMA NORTHERN JUDICIAL DIVISION AT ASHVILLE

Cayce Collins Moore.

Petitioner

VS. **Case No. CC86-~~360~~ 03.60A**

State of Alabama,

Respondent

ORDER UPON HEARING ON PETITION FOR POST-CONVICTION RELIEF

(Filed Mar. 2, 1999)

This cause comes before this Court upon the petition for post conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. Upon a hearing and based upon the evidence, a review of the Court file, and a review of the trial transcript, the Court makes the following findings of fact:

Findings of Fact

1. The Petitioner, Cayce Collins Moore was convicted of the offense of capital murder, intentional murder during robbery in the 1st degree, under Code of Alabama (1975) §13A-5-40(a)(20).

2. On February 24, 1989 the Alabama Court of Criminal Appeals affirmed the defendant's conviction without opinion. A petition for writ of certiorari to the Alabama Supreme Court was denied on August 4, 1989.

3. Prior to the trial the defendant was evaluated at Taylor Hardin Secure Mental Facility. The evaluation noted the defendant's depression, but even with such notations the defendant was found to be competent to stand trial. The defendant was at Taylor Hardin for evaluation for a period of over a month.

4. The Moore's capital murder trial began on August 10, 1987. On the night of August 16, 1997 the defendant took and [sic] overdose of a medication. The defendant remained at Baptist Montclair Hospital for a period of 10 days. The defendant was examined by Dr. Kamal A. Nagi at Baptist Montclair at the request of the trial judge, Hon. Carl D. NeSmith. The defendant related to Dr. Nagi that he was attempting, through his actions to get the trial moved from Ashville. Dr. Nagai [sic] found that the defendant was competent to stand trial after the overdose.

5. After the defendant's overdose, his bond was revoked and the defendant was confined to the St. Clair County Jail. At that time the defendant began a hunger strike.

6. On the night of September 1, 1987, Moore was once again taken to the hospital, this time St. Clair Regional in Pell City. Moore was seen on the bed drinking liquids at that time. At various times during the trial Moore was seen either eating or drinking.

7. The defendant's expert, Dr. James Lewis, testified in this Rule 32 hearing as to the effects of water depletion and food deprivation. Dr. Lewis's testimony was based on an interview with the defendant more that 10 years after the fact. Dr. Lewis testified that it would be difficult for a physician to say, without seeing the ~~person,~~ that there was any disorientation as a result of lack of food or water.

8. Dr. Stanley Brodsky testified for the defendant at this Rule 32 hearing. Dr. Brodsky performed what he termed as "Retrospective Competency to Stand Trial" evaluation. Based on his review of the records and news reports from over 10 years prior, Dr. Brodsky formed the opinion that Cayce Moore "did not show the ability to meet the psychological understandings of being competent to stand trial."

9. The petitioner, Cayce Moore was not present to testify at this Rule 32 hearing. His attorney at trial is deceased. There were no motions filed in the original trial concerning Moore's inability to effectively assist counsel due to a lack of food or water. The judge presiding over the trial and seeing the defendant first hand on a daily basis in the trial did not find it necessary to address the defendant's inability to assist counsel. Judge NeSmith had not shown an unwillingness to allow Moore the time necessary to recuperate from his overdose. Judge NeSmith had recessed the trial for 10 days until Dr. Nagi assured him that Moore was competent to proceed.

10. This court finds that the defendant Cayce Moore was competent to stand trial and was able to effectively aid and assist his counsel in his defense during his capital murder trial.

Application of Law to the Facts

The defendant Cayce Moore undertook a calculated and concerted effort to disrupt his capital murder trial. Through his own actions in taking a drug overdose, the trial was delayed for a period of ten days.

When that tactic did not work he began his hunger strike. Despite his best efforts, Moore did consume food and drink at times during his trial.

Moore now claims, over 11 years later, that his conviction for capital murder should be overturned, thus renewing his calculated trial strategy, and attempting to gain in this Rule 32 Petition what he could not achieve at trial.

Moore's claimed effects of his hunger strike is that while physically present in the courtroom, he was mentally unable to assist his counsel based upon his self-induced deprivation of food and drink. While the above findings of fact are that the defendant, did in fact, obtain food and liquids at times during the trial, the defendant's asserted grounds are much like a disruptive defendant who is excluded from the Court room.

One whose own actions causes him to be absent from trial, cannot claim error. *Ex Parte Jackson*, 674 So.2d 1365 (Ala. 1994); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Further, the defendant cannot create grounds for mistrial by his own actions. *Hayes v. State*, 340 So.2d 1142 (1976)

Order of the Court

It is therefore **ORDERED, ADJUDGED and DECREED** that based upon the above and foregoing findings of fact, the defendant's petition for relief under Rule 32, Alabama Rules of Criminal Procedure is hereby overruled and denied.

DONE AND ORDERED this the 2nd day of March, 1999.

/s/ Robert Austin
Circuit Judge

Baptist Medical Centers
Birmingham, Alabama

DISCHARGE SUMMARY

Name: MOORE, CASEY Room No: Unit No: 310516

Date of Discharge: 8-21-87 to 8-27-87

Attending Physician: Dr. C. Toro

This discharge summary corresponds to the psychiatric admission of the patient.

HISTORY OF PRESENT: This is a 19 year old white male who was admitted to our unit in psychiatry for the first time. HE was first admitted to ICU medical unit after taking an overdose of approximately 80 Phenobarbital tablets and similar number of Etrafon. The patient underwent the usual work up and treatment from which he recovered. In consultation in MICU the patient was extremely depressed and stated that he has been idited [sic] for a criminal offense and his prospective is to spend all the rest of his life in jail or be executed. He stated that he did not intend to live and that he would try to commit suicide on any opportunity that he could do so. He was advised to be transferred to the psychiatric service since the medical work up is finished and his conditions owas [sic] stable which the patient accepted and he was transferred on 8-21.

PHYSICAL EXAMINATION at that time has not change [sic] since the evaluation on the medical service.

LABORATORY DATA: No laboratory tests were done except for repeat chest x-ray for a respiratory condition which was reported as normal, and a psychological evaluation done by Dr. Brecht showed the patient to be functioning in the very high level of intellectual function with IQ 148 and the general test was compatible with severe depression and suicidal behavior.

HOSPITAL COURSE: The patient was admitted to our ICU where he was mtaintained [sic] on continuous observation for suicidal behavior through the monitoring system as well as visits by nursing personnel. The patient was withdrawn, spent most of the time in his room, a good deal of time in bed. He interacted well during the sessions with him, however, he was not very productive since his legal situation was the most predominant factor and interfering with an appropriate psychotherapeutic intervention. Since the transfer of the patient to our unit, the St. Clair County Circuit Court was continuously asking for a prompt relief of the patient from the hospital in order to pursue his trial. It was discussed with the mother than [sic] in my opinion the patient was extremely suicidal, very depressed, severely depressed and would be [sic] need to be considered for commitment. The family apparently discussed this issue with the attorney for the defense however no decision was made and finally the court revoked his bond and the patient was no longer free to decide about his treatment. Recommendations based on request by Judge Nesmith of the Circuit Court, the patient was transferred to the ST. Clair Jail, both the sheriff Mr. Brown as well as the judge were made aware of the risks involved for this patient in terms of suicidal behavior, the need for treatment, however the judge stated that the sheriff's responsibility was to make sure that the patient was well taken care of. The patient was in fact transferred to the jail on 8-27-87 and until then his condition has been quite unstable, due primarily to the uncertainty as to whether he would be allowed to have treatment or not.

The patient stated until the very end that he would commit suicide whenever he had the opportunity to do so. No follow up plans were made.

CT/bgh
Dict. 9-1-87
Trans. 9-2-87

________________________ M.D.

Baptist Medical Center Montclair
Birmingham, Alabama

INTENSIVE CARE UNIT – ADMISSION ASSESSMENT

Date: 8/17/87 TIME: 1040 VIA: stretcher AGE: 19

HEIGHT: _______ WEIGHT: [illegible]

FROM: ER

DIAGNOSIS: OD ~~Tylenol #4~~, Percodan, ~~Cocaine~~

ALLERGIES: ________________

OTHER ACUTE OR CHRONIC ILLNESSES: __________

DRUG THERAPY: ________________

I. CARDIOVASCULAR

1. Apical Pulse: 130 [Illegible] __________
2. Blood Pressure: R 144/100 L __________
3. Temperature: 96AX
4. Pedal Pulses: R 3+ L 3+
5. Edema: 0
6. Rhythm: [Illegible]
7. Skin Color and Temperature: w/[illegible]; pale

8. Skin Turgor: [Illegible]

9. Heart Sounds: [illegible]

10. Nail Beds: pinkz quick refill; [illegible] pale

II. PULMONARY

1. Respiratory Rate and Characteristic: [Illegible]

2. O_2 Therapy: TV 1200 : FIO 60 IV 16

3. Breath Sounds: [illegible]

4. Airway patent and adequate air exchanger:

Yes ✓ No ____

5. Chest Wall Movement Symmetrical: [illegible]

6. Other:

III. NEUROLOGICAL

1. Glascow Coma Scale Score: 1/1

2. Pupil Reaction to Light and Equality:
[illegible]

3. Pupil Abnormality: [illegible]

4. Extremity Movement: none

5. Hand Grasp: none

6. Speech: none

7. Response to Stimulation: comatose

8. Emotional/Mental Status:

9. Other: intermittent decorticate posturing

/s/ Laura Mann RN
ADMISSION NURSE

IV. MUSCULOSKELETAL

1. [Illegible] 0

2. Edema: 0

3. Foot: a. [Illegible] cool

b. Sensation to touch

V. GASTROINTESTINAL

1. Usual diet: unknown

2. Nausea/Vomiting and Characteristic: NG tube

3. Bowel Sounds: active

4. Distention or Rigidity: soft

5. Bowel Function: 0

VI. GENITOURINARY

1. Bladder Function: foley

2. Foley/Catheter: adequate

3. Other:

VII. PAIN

1. Location: N/A

2. Type:

VIII. BLEEDING OR DRAINAGE

1. Location: none

2. Type and Amount:

IX. DRESSINGS AND TUBES

1. Dressings: ____________________

2. Tubes: a. ET tube

b. foley

c. NG tube

X. INTRAVENOUS FLUID (Amount, Type, Additives)

1. RLCKVO
2. Dopamine [illegible]
3. ____________________
4. ____________________

XI. RELEVANT SOCIAL HISTORY

Unknown

ALABAMA PSYCHIATRIC SERVICES, P.C.
ADULT, ADOLESCENT AND CHILD PSYCHIATRY
[Names Omitted In Printing]

August 24, 1987

Judge Carl D. Nesmith
Circuit Court
Ashville, Alabama

RE: Cayce Moore

Dear Judge Nesmith:

Cayce Moore has been a patient at Baptist Medical Center – Montclair since August 17, 1987. He has been under my care at that Hospital since August 21, 1987.

Before Mr. Moore is released from the Hospital, there are three areas of his condition with which I think you should be familiar.

1) An E.E.G. was done before Mr. Moore was under my care. The results of that were abnormal. I recommend that a repeat E.E.G. be done.
2) Mr. Moore had a temperature elevation and other signs of an upper respiratory infection late last week. This condition is being treated, and the problem should be resolved within a few days.
3) Mr. Moore is depressed and is a high risk for another attempt at suicide. In my opinion this problem will not be resolved in the foreseeable future.

Sincerely,

/s/ Claudio Toro
Claudio Toro, MD

CT: dae

ALABAMA PSYCHIATRIC SERVICES, P.C.
ADULT, ADOLESCENT AND CHILD PSYCHIATRY

[Names Omitted In Printing]

August 27, 1987

The Honorable Carl D. Nesmith
Judge of Circuit Court
St. Clair County
Ashville, Alabama

RE: Cayce Moore

Dear Judge Nesmith:

Following our telephone conversation this afternoon, Mr. Cayce Moore has been released to Sheriff Louis Brown of the St. Clair County Sheriff's Department.

As pointed out to Sheriff Brown, Mr. Moore suffers from severe depression with a very high risk for suicidal behavior. It is my opinion that Mr. Moore needs to be treated and observed continuously for prevention of suicidal behavior.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Claudio Toro
Claudio Toro, MD

CT: tle

IN THE CIRCUIT COURT OF
ST. CLAIR COUNTY, ALABAMA

THIRTIETH JUDICIAL CIRCUIT,
NORTHERN DIVISION AT ASHVILLE

STATE OF ALABAMA

VS.

CAYCE COLLINS MOORE

DEFENDANT. CASE NO. CC86-03

MOTION TO REVOKE BOND

(Filed Aug. 25, 1987)

Comes now the State of Alabama, by and through its District Attorney, W. Van Davis, and moves this Honorable Court to revoke the Appearance Bond heretofore set by this Honorable Court upon orders of the Alabama Court of Criminal appeals and as grounds for said Motion would show as follows:

1. On or about September 3, 1985, the Defendant was certified by the Honorable Jim Embry, Jr. Judge of the Juvenile Court, to stand trial as an adult and said case was further bound over to action of the Grand Jury at said time.

2. On or about September 16, 1985, Russell T. McDonald, Jr., Attorney for Defendant, filed in the Circuit Court of St. Clair County, Alabama at Ashville, Alabama, a Petition for Writ of Habeas Corpus and said Petition for Writ of Habeas Corpus was denied by this Honorable Court on December 3, 1985.

3. Subsequent thereto, on or about December 9, 1985, the Alabama Court of Criminal appeals ordered that bond be set for the Defendant in a reasonable amount.

4. Subsequent to the Order of the Alabama Court of Criminal Appeals, this Honorable Court on the 16th day of December, 1985 entered an order setting bond for this Defendnat [sic] in the amount of $50,000.00. Said bond was made by Defendant on the 16th day of December, 1985 and Defendant was released from custody.

5. The trial of this case proceeded on the 10th day of August, 1987 at the Courthouse in Ashville, Alabama, St. Clair County, Alabama, and continued until August 14, 1987 at which time the jury in said case was recessed until Monday, August 17, 1987.

6. When the trial of the case resumed on Monday morning, August 17, 1987, the Court was advised that the Defendant was not present and had been admitted to Brookwood Medical Center in Birmingham, Alabama and was being treated for apparent drug overdose.

7. Upon notification of the Defendant's absence from Court, the trial of said case has been continued from time to time and is still in a state of recess at the present time.

8. The Defendant, by his own actions, has voluntarily removed himself from the trial of this case and is obviously a present danger to himself and others.

9. It would be in the best interest of the State of Alabama and the Defendant at this time that the bond heretofore set by this Court at the order of the Alabama Court of Criminal Appeals be revoked.

W. VAN DAVIS
DISTRICT ATTORNEY

/s/ W. Van Davis

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on the Honorable Russell T. McDonald, Jr., Attorney for Defendant, by U. S. Mail, properly addressed, this the 25 day of August, 1987.

/s/ W. Van Davis
W. VAN DAVIS
DISTRICT ATTORNEY

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA
NORTHERN JUDICIAL DIVISION
AT ASHVILLE, ALABAMA

STATE OF ALABAMA

VS. CASE NUMBER: CC 86-03

CAYCE COLLINS MOORE,

DEFENDANT

ORDER

(Filed Aug. 25, 1987)

Trial of the above styled case was commenced on August 10, 1987 and the trial was continued from time to time and from day to day, and on August 17, 1987 the defendant, Cayce Collins Moore was admitted to Baptist Montclair Hospital, Birmingham, Alabama by his mother. The Court has received reports concerning the competency of the defendant to continue to stand trial, but no definite time has been given by medical personnel in said facility relating to the time that said trial my reconvene [sic] and the competency of the defendant to continue to stand trial.

ORDERED, ADJUDGED AND DECREED that Taylor Hardin Secure Medical Facility conduct an examination of the said defendant, Cayce Collins Moore for the purpose of determining if the defendant is presently competent to continue trial of said case. The said examination is to be conducted at Baptist Montclair Hospital, Birmingham, Alabama. The said Taylor Hardin Secure Medical Facility is ordered to furnish the Court a report of the findings of said examination.

The Clerk is ordered to give notice of this order to the District Attorney, W. Van Davis and to the defendant's attorney, Russell McDonald, Jr.

Done and Ordered this the 24th day of August, 1987.

/s/ Carl D. Nesmith
Circuit Judge

copy to D.A.
Copy to Russell McDonald, Jr.
8-25-87
DB

IN THE CIRCUIT COURT FOR ST. CLAIR COUNTY,
ALABAMA NORTHERN JUDICIAL DIVISION

CAYCE COLLINS MOORE,
PETITIONER
VS CASE No. CC 86-03.60
STATE OF ALABAMA,
RESPONDENT

This being the day set for hearing on the Petition for Post Conviction Relief under Rule 32 of the Alabama Rules of Criminal Procedure, being the 16th day of October, 1998 at the St. Clair County Courthouse Ashville, Alabama, commencing at 9:00 A.M. before the HON. ROBERT E. AUSTIN, Circuit Judge, 30th Judicial Circuit.

* * *

[136] A Yeah, I was called by Judge NeSmith to go to the hospital, I think Montclair Baptist or Baptist Montclair to see Mr. Moore after he was admitted following an overdose.

Q Did you in fact travel to that hospital?

A Yes, I did.

Q Tell us what you did when you got there please.

A It was the evening. I went through the information desk and I requested permission to go visit Mr. Moore. There was a lot of restrictions at the time for his visitation. I told the receptionist that I had a court order to go and visit him and make a report about his status. And I would like to call his psychiatrist first to get his okay. She called the psychiatrist and it was okay for me to go see him. When I went upstairs, I think it was the seventh or eighth story floor. I went to his room and he was standing looking through the window. It was kind of a panoramic window overlooking Birmingham. He was by himself and was not on one-to-one observation or any suicidal observation. He recognized me and sat down and start talking. I explained to him the reason for the visit or the purpose of this visit. He said that he wanted to talk. Then afterward, he expressed his displeasure of the way the court was – I mean the jury in this small town –

* * *

[141] Q He said, "what do you want me to do – shoot the jury to have it mistried"?

A Yes.

Q What else was said?

A I told him, "I don't think you need to go that far." I said, "You think you are ready?" He said, "I don't think I would like to continue with this. Anyhow, I would not have talked to you – anyhow that is fine with me." We spent about an hour talking. I told him some will be confidential if he wanted. His attorney in the trial said "Go ahead with his permission. It is not confidential information. Tell what he told you." I felt – I don't know – on my part, I felt this was very ugly to talk in front of the jury about he wants to shoot them. It just came to my mind not to enter this.

Q That is why you didn't say it at the trial in front of the jury?

A Yes, but he allowed me to talk about anything that I wanted to talk about.

Q So after that time spent with him, you came back and reported that you thought he was competent to stand trial?

A I told the Judge and he said he would send the next day for him. His psychiatrist also released him. [142] He say he is ready to go.

Q So he did come back and start the trial?

A Yes, the next day.

Q Is that the last time you have seen or evaluated Cayce Moore?

A I went to testify afterward.

Q You did no further evaluation?

A No.

Q Were you aware he restricted his intake of food and liquid following his release from Baptist Montclair? Did you know that?

A No, I was not aware of that.

Q And a few days later he was treated at St. Clair Hospital for dehydration. You didn't know that.

A It is possible, but I didn't know.

Q Do you know Dr. Brodsky over there?

A Yes.

Q How do you know him?

A He is the Chairman of the Department of Psychology and Forensics.

Q At Tuscaloosa?

A Yes.

Q And you are from Tuscaloosa?

A Yes.

Q And you know him because you are kind of in [143] the same field?

A I see him everyday in the water aerobics.

Q Have you ever heard of Retrospective Competency Evaluations?

A No. It is not actually a special term or thing to call it. I don't know what you call it. There is always a possibility for going back and request or have some questions about any defendant's competency if there is strong findings that the defendant was incompetent and he was asked or ordered to proceed with the trial. For example, severe mental retardation, or severe brain damage or head injury and problems of memory in spite of these patients – all the documentation, school records and all others that attest to their incompetency. Then all of a sudden, these defendants go to trial. If we have all these documentations – and I think there is some question to go back.

Q But you never heard that term?

A Whatever you call it, no.

Q Have you ever talked to Dr. Brodsky about Retrospective Competency Evaluation?

A No, we did not discuss it.

Q And you have found that Cayce Moore was competent on two different occasions at the direction of this Court or Judge NeSmith. Is that correct?

[144] A Yes.

Q And the last one was while he was hospitalized at Brookwood?

A Yes.

Q I mean not Brookwood, but Montclair.

A Yes.

Q That's all.

ON EXAMINATION BY MS. BROWNSTEIN:

Q Was Dr. Toro the psychiatrist who was treating Cayce Moore at Baptist Montclair?

A I don't remember the name, but it is possible. You have his name, then he was the treating psychiatrist. I called him on the phone and he said it was "Okay. He is ready to go."

Q He told you "He is ready to go"?

A Yes.

Q Do you recall testifying at the trial in 1987?

A Yes.

Q Do you recall answering the question – "Q. Was it your opinion he.." meaning Cayce Moore.. "should receive more treatment there before being dismissed?" And your answer, "No. I told him 'You are in charge. If you feel comfortable discharging him, you go ahead. If you don't, do whatever you want. You can commit him.'" Do you recall saying that to Dr. Toro?

[145] A That was eleven years ago. I don't remember.

You are talking about he said he is okay. He can go back.

Q You recall who saying that – Dr. Toro or you?

A Dr. Toro.

Q Let me hand you what is marked Petitioner's Exhibit No. 11. This is a portion of the trial transcript. Let me call your attention to the bottom of Page 803, if I could. Line 14 or 15 – starting with "..Dr. Toro believed he needed it.."

A Needed treatment.

Q I'm sorry, let's back up to the question. "Was it your opinion that Cayce should have more treatment there at the hospital?" What did you answer?

A He said he needed it.

Q You said at that time, "Dr. Toro believed he needed it.." meaning more treatment. Right?

A That is possible.

Q Then Mr. Dobson, the Assistant district Attorney, "Judge, we object to anything Dr. Toro said unless he is present in Court." And the Court sustained it. The question was, "Was it your opinion he should receive more treatment there before being dismissed?" What was your answer?

A "No."

[146] Q You didn't think so. You said, "I told him 'you are in charge. If you feel comfortable discharging him, you go ahead. If you don't, do whatever you want. You can commit him.'" Then you went on to say, "He said.." meaning Dr. Toro.." I'm going for commitment because he was afraid to let him go." The quotation is after the word "go". You were saying, "I'm going for commitment". You were saying that he was saying to you, "I'm going for commitment." Then you said, "Because he", meaning Dr. Toro..was afraid –

MR. WILLIAMSON: Judge, I object to this. This is a transcript. She is trying to interpret what this transcript says. She wants to change the punctuation and she wants to give him a reason for saying this and explain to the Court what he really meant.

THE COURT: Let's chop that up into smaller questions.

Q Did you say in this transcript, on Line 15, that Dr. Toro believed that Cayce Moore needed more treatment?

A It is possible. If it is transcribed here that at the trial I said it, then I must have said it.

Q And your recollection back just a few days [147] after this discussion with Dr. Toro was better than than it is now, eleven years later. Is that fair to say?

A At that time, I don't have privilege in the hospital for admission or treatment. My responsibility is only to evaluate whether he is ready to proceed or not.

Q That is not what I'm asking you.

A I don't want him to discharge him and something happen. He is the attending psychiatrist and he should give the okay. If he wants to treat him, he can treat him. If he wants to commit him, he can commit him. I believed strongly at that time that he was ready to proceed with trial because –

Q Dr. Nagi, excuse me. I'm not asking you that question, sir. you testified earlier that you felt – let me back up, I'm sorry. You testified that Dr. Toro believed that Cayce Moore was ready to go. You said that. Right?

A Yes.

Q Here eleven years ago, just a few days after that conversation with Dr. Toro, you related something totally different to the Court. You said, "Dr. Toro believed he needed it."

A Yes, that is Dr. Toro.

Q Okay, I'm just asking you –

[148] MR. WILLIAMSON: Judge, she is arguing.

MS. BROWNSTEIN: I'm asking a question about his prior inconsistent statement.

THE COURT: Overruled, go ahead.

Q Does reading this transcript refresh your recollection as to whether Dr. Toro believed that Cayce Moore was ready to leave the hospital or not?

A Yes.

Q Now that you have read this, what is your view as to whether Dr. Toro believed Cayce was ready to leave the hospital or whether he believed that Cayce needed more treatment?

MR. WILLIAMSON: Now, I object to what he believed that Dr. Toro believed.

MS. BROWNSTEIN: He was asked this question on direct, Judge.

MR. WILLIAMSON: May I complete my objection or shall I sit down and wait for her?

MS. BROWNSTEIN: I apologize.

THE COURT: Go ahead.

MR. WILLIAMSON: She has already offered into evidence and it has been admitted, two letters from Dr. Toro, which would, I would assume on August 24th and August 27th of 1987 would be more accurate as to [149] what Dr. Toro believed than would eleven years later asking this doctor to tell us what he believes another doctor might have believed eleven years ago. These are in evidence and the Court has them. That is speculation to ask what he believes another doctor believes. He was released and put on trial. Here are the documents in evidence.

MS. BROWNSTEIN: Judge, it is call [sic] impeachment.

THE COURT: What is your question to Dr. Nagi?

MS. BROWNSTEIN: Whether or not reading this testimony refreshes his recollection –

THE COURT: He said yes.

MS. BROWNSTEIN: He said yes, and I asked, "Now that your memory has been refreshed, do you now believe that Dr. Toro was ready to release Cayce Moore from the hospital or whether he felt Cayce Moore needed more treatment?"

THE COURT: Go ahead.

A My quess [sic] is –

Q No, not your guess. You said your memory was refreshed.

[150] MR. WILLIAMSON: Judge, that is why I objected.

MS. BROWNSTEIN: If he is guessing, I move to strike all his testimony.

MR. WILLIAMSON: He is just guessing on this question you have asked. How can he know?

THE COURT: Are you asking him to state with definite certainty what Dr. Toro thought and not use his best judgment or guess as to what he thought. I don't think you can have it both ways.

MS. BROWNSTEIN: I want his best judgment.

THE COURT: Go ahead.

A Again, I cannot talk for Dr. Toro. That is his – he wants to do that, he could have pursued commitment or written to the Judge asking that the patient was not ready to be released. He could have done that. He told me, "Go ahead. He is ready." That is what went on the form.

Q So you lied at trial when you said he said he needed more treatment?

MR. WILLIAMSON: Judge, I object.

MR. BROWNSTEIN: Judge, this is a prior inconsistent statement.

THE COURT: Overruled. Go ahead.

Q Were you lying when you said this?

A No, I told the Judge he was ready and that is [151] my judgment.

Q I'm not asking you what your opinion was, sir. I'm asking you whether or not you were lying at trial when you said, "Dr. Toro believed that Cayce Moore needed more treatment"?

A At the beginning, yes.

Q I'm not asking you at the beginning. I'm saying on the day you talked to Dr. Toro –

MR. WILLIAMSON: Your Honor, I object, she is badgering this doctor.

THE COURT: Overruled, go ahead.

A That is a possibility that he said he needed treatment.

Q Okay, Nothing further.

ON EXAMINATION BY MR. WILLIAMSON:

Q And he did release him, didn't he?

A Yes.

Q He can still release someone that needs treatment. Is that correct?

A He cannot release someone who needs treatment. That was not the question. I asked him and he said "Go ahead. He is ready." That is the reason I called the Judge. I said, "His psychiatrist told me he is ready and I feel that he is ready because when I went to see [152] him, he was looking through the window and he was not on one-to-one observation and no suicidal observation at the time." So he was ready.

Q Who released him from the hospital?

A His doctor.

Q Dr. Toro?

A Yes.

THE COURT: On Page 803, you testified at trial that Dr. Toro said, "I'm going for commitment because he was afraid to let him go." Did Dr. Toro say that: "I'm going for commitment because I'm afraid to let him go"?

A Yes.

THE COURT: Do you know what he meant by that?

A You see, usually you have to be very conservative when someone takes overdose. He has to make this kind of precaution. That is my guess.

THE COURT: Was that addressed to a fear of another suicide attempt.

A This was a couple of days only that he stayed there – I don't know – twenty-four hours or so. Definitely, he does not want to release him prematurely until he sees exactly what he is dealing with. He was uncomfortable possibly releasing a man on short notice.

* * *

Circuit Court No. CC 86 03 Criminal Appeals Court No. ___

APPEAL

TO

Court of Criminal Appeals

of Alabama

FROM

CIRCUIT COURT OF ST CLAIR COUNTY, ASHVILLE, ALABAMA 35953

CAYCE COLLINS MOORE

Appellant

vs.

STATE OF ALABAMA

Appellee

* * *

[R-347] THE COURT: Overruled.

MR. DAVIS: Judge, I understood the question to be did this man think they were going to kill themselves. I object in that form because it calls for a mental operation on the part of this witness.

THE COURT: Overruled. He can base it on what he saw.

A I don't know if they were or not.

Q Were your reactions or your procedures as if they were?

A We had two white males sitting there with cocked guns to their head. I had no idea whether they would pull the trigger on themselves or someone else. My main concern was getting the guns.

Q How long did you stay there with them coaxing them not to pull the trigger?

A Thirty to forty-five minutes or maybe an hour with them. I was there all totaled about two hours.

Q You called for help?

A Correct.

Q You called for help from someone that you thought had more experience in that line?

A Yes.

Q And who is that man?

* * *

[R-607] I elicited from him a history of the problem.

He informed me there were charges pending against him for a homicide. I pursued in my examination of him a history of depression and the problems he perceived in himself. In eliciting his history, Cayce went back in his childhood and told me he had his first awareness of problem and serious depression starting as early as the age of seven or eight years of age. At this period of time, he described feeling profoundly depressed – lying on the floor of his room. He stated as time went on, in the next couple of years, his depression worsened. The episodes became more frequent. By approximately the age of nine or ten years of age, he had his first suicidal thoughts. At approximately the age of twelve years, he wrote a suicidal note. He described during this period of time episodes of distortion of reality. He had the feeling things were not real. There were experiences that life was mechanical experience that he was walking through. He had auditory hallucinations. He heard a female voice talking to him. He indicated he would communicate back and forth with the female voice. He stated at times he made bets with this voice. He also experienced visual hallucinations and on occasion, would visually hallucinate someone in his field of vision. He had the sense of an imaginary [R-608] companion who was with him. He had some experiences of tactile hallucinations – feeling things on his body, particularly his hands. He stated he used to have a sense of something strange-smelling on his hands and he would frequently smell his hands. By the age of approximately ten or twelve, along with the suicidal notes, he had begun engaging in behavior which reflected the depth of his suicidal feelings. On occasion, he held a gun to his head but couldn't pull the trigger. He indicated he made some slashes in his wrist at one point in time. As we get out of his period up to the age of ten or twelve years of age, into his adolescent period, he became aware he was beginning to have mood swings. He would have brief episodes of them in which he felt very hyperactive – full of energy and euphoric – on the high side.

Suddenly, that mood would change very rapidly. He would plummet into the depths of depression. He went through periods of being up or being down. The periods of being down predominated. Periods of being up were less frequent. During the periods in which he felt up, he stated the behavior changed. He would –

MR. DAVIS: Judge, could we get a time-frame of this. He was taking when he was seven or eight years old –

[R-609] MR. McDONALD: No, he said adolescence.

MR. DAVIS: I would like to have the Doctor tell the Jury what age we are talking about.

A. I did set the time-frame.

MR. DAVIS: Tell us what adolescence means, sir.

MR. McDONALD: Judge, I object to his cross-examining the witness in the middle of my examination.

THE COURT: Doctor, you referred to adolescent stage of his life. What age is that?

A Adolescence usually begins at eleven or twelve through eighteen.

THE COURT: Overruled.

MR. DAVIS: Eleven and twelve through eighteen is a very broad range when he is talking specifically about answers this defendant gave him. Again, I object to the narrative response.

THE COURT: This is related to his examination. Overruled. Go ahead, Doctor.

MR. DAVIS: We except.

Q At the age of adolescence, there were mood swings beginning. I was referring to how it would [R-610] reflect in his behavior. He indicated some of his behavior during the period when he was high, he recognized this as being inappropriate. He stated he was often clowning or flirtatious with women. He indicated there were periods in which he antagonized his teachers and attempted to get them angry with him. Particularly at the age of fifteen and sixteen years of age, he described these periods of mood elevations and hyperactivity. At the age of seventeen years of age, he indicated he began to have significant high periods, which includes symptoms of hyperactivity along with agitation. He states he could hear his pulse pounding in his ears during this period and he was aware that he became more compulsive in his behavior. The patient described, as I mentioned earlier, from the period of childhood through adolescence a worsening of his depression. The depression was actually more profound in his teens and complicated by mood swings as I described. I asked Mr. Moore about suicide attempts – actual attempts. He stated in May of 1986, he made a suicide attempt at home by overdosing with a number of medications which he found at home. He was staying at home in Leeds with an aunt and uncle and his mother. He made his overdose of multiple drugs during a period of time in which everyone had left the home. [R-611] It was his intent to be successful and not to be found. Based on the time descriptions he gave me, there was little opportunity for rescue. When the family did come home, he stated his mother found him and he was difficult to arouse. He ultimately did become arousable and indicated at this period of time, his mother, though he believed she knew he had made a suicide attempt, did not seek medical attention for him. At this point in time, in evaluating Mr. Moore, he had not had any significant psychiatric treatment. In obtaining a past history from him, he had been briefly hospitalized at Brookwood Medical Center some time earlier that year and had been evaluated by a psychiatrist or psychologist who had not found any problem with Mr. Moore at that time. That was the history he gave me. In further eliciting his history, I went back in time to a period in which problems developed with him and how he was responding to the problems. He told me that one of the things he got involved in was playing a number of games which included Dungeons and Dragons and Top Secret. He stated he was first introduced to these games when he was approximately eleven years of age by an individual by the name of Bolroy Crump who was approximately seven years older that he was at the time. He stated he became basically obsessed with these games and would [R-612] spend basically hours and hours playing the games. In approximately the ninth grade, he became involved with a fellow by the name of Scott Davis, who he had known earlier. He and Scott became involved in playing this game together. I believe also at that point in time, there was another fellow by the name of Chris White that became involved in playing these games. He indicated that they spent more and more time playing these games. Cayce indicated he particularly became interested in Top Secret. He stated to me that he would spend as much as thirty hours per week at times playing these games. As time went on, they began to change from just playing the game to playing the game out in reality. Cayce indicated the three of them, in 1984 and 1985, began playing these games and developing ventures in which they would go out and break and enter into colleges and homes along the river. I'm not familiar with the Ragland area. The purpose of breaking and entering was not to steal anything of value; but simply to experiment with playing these games out in reality. He said at times they would take small items such as a screwdriver, which was simply symbolic with their conquest of playing the game. As time went on, they became more intensely involved in the games in playing them out in reality, and also

* * *

[R-800] MR. DOBSON: I tried to ask a question concerning this, and you objected as leading, and I agree with you.

MR. McDONALD: I'll object to anything that is leading and suggestive. This is the State's witness.

THE COURT: Overruled.

Q Read that sentence, please.

A "He said he was scared . . . this individual's impression was Mr. Moore was evasive and was selective amnesia when asking about the events."

Q Define selective amnesia again, please?

MR. McDONALD: Judge, this is repetitious.

MR. DOBSON: I don't insist on it. That's all.

ON EXAMINATION BY MR. McDONALD:

Q Did you see the defendant in the hospital?

A Yes, I visited him in the evening.

Q When did you see him there?

A I saw him around seven o'clock.

Q What day?

A Three days after – it was either Wednesday or Thursday.

Q Last week?

A Yes, sir.

[R-801] Q What was his condition then as you saw him?

A He was standing and looking through the window with his toothbrush in his hand, brushing his teeth, with his shorts and shirt on. He was a little surprised with my visit. It was unannounced.

Q Did you examine him?

A I talked to him for a while. I told him I owed him a visit since I heard about his attempt to commit suicide. I decided to drop by. At the same time, I had an order from the Judge to see whether he was able to stand trial. We talked for a while. He said, "Did you get permission from my psychiatrist or from my attorney?" I told him, "No, I did not." He said, "I could have refused to talk to you." I said, "It was your privilege." He asked me if it was confidential and I told him part may be, and the other I would have to report to the court of my findings.

Q Did you come to any evaluation concerning his physical condition?

A Yes, he coughed a few times during the interview.

Q Did you come to any conclusions concerning his mental condition?

A He was able to stand trial.

Q Did you express that to him and his mother?

* * *

[R-803] Q Was anybody else involved in that conference besides you and Dr. Toro?

A No. I talked to him on the phone.

Q Did you talk to him there at the hospital?

A No.

Q In your talking with Dr. Toro, was it done as two doctors consulting with each other, or were you talking to him to find some information? Were you consulting concerning his status?

A Sure, we talked professionally about the case. We talked with each other about what can be done.

Q Was it your opinion that Cayce should have more treatment there at the hospital?

A Dr. Toro believed he needed it –

MR. DOBSON: Judge, we object to anything Dr. Toro said unless he is present in Court.

THE COURT: Sustained.

Q Was it your opinion he should receive more treatment there before being dismissed?

A No. I told him, "You are in charge. If you feel comfortable discharging him, you go ahead. If you don't, do whatever you want. You can commit him." He said, "I'm going for commitment because he was afraid to let him go." He said he was going to pursue [R-804] commitment. I called the Judge and explained to him my findings.

Q That's all.

ON EXAMINATION BY MR. DOBSON:

Q Did you determine he was competent to stand trial at that time?

A Yes.

Q That's all.

MR. McDONALD: Nothing further for the defense from this witness.

(At this time, Court was recessed for the day, with the Jury being instructed by the Court to follow all instructions previously given by the Court.)

September 3, 1987 at 9:00 A.M.

(The Jury being seated in the jury box, with the defendant and all attorneys present.)

THE COURT: Do any of you ladies and gentlemen of the jury have anything to report this morning to the Court relating to instructions that have been given to you?

(No response)

THE COURT: All right, let's proceed.

* * *